August 13, 1999

Date:

Case Nos.: 1998-SWD-3
1999-SWD-1
1999-SWD-2

In the Matter of:

Beverly M. Migliore
Complainant

V.

Rhode Island Department of Environmental Management
Respondent

For the Complainant:
Joel D. Landry, Esq.
Todd Robins, Esq.

For the Respondent:
James R. Lee, Esq.
Assistant Attorney General
Matthew T. Oliverio, Esq.

Before:
DAVID W. DI NARDI
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provisions of the Solid Waste Disposal Act, 42 U.S.C. § 6971, and the implementing regulations found at 29 C.F.R. Part 24 and Part 18. The following abbreviations shall be used herein: ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Complainant's Exhibit, and EX for an Exhibit offered by Respondent, Rhode Island Department of Environmental Management.

On May 8, 1998, Beverly M. Migliore (Complainant) filed a complaint of retaliation against Rhode Island Department of Environmental Management (RIDEM or Respondent). (ALJ EX 2) Complainant, a RIDEM supervising environmental scientist, alleges that she has been "subjected to a pattern of retaliatory treatment at work culminating in her suspension from duty on April 13, 1998, and has been otherwise discriminated against as a result of her having engaged in activity protected under the employee protection provisions of the Resources Conservation and Recovery Act (RCRA), 42 U.S.C. § 6971." This complaint was investigated by OSHA and referred to the Office of Administrative Law Judges under cover letter dated June 16, 1998. (ALJ EX 1)

By document dated September 9, 1998, Complainant submitted a second complaint, alleging that Respondent continued to "intimidate, coerce, threaten and otherwise discriminate against [her], culminating in a specific, unambiguous threat of adverse personnel action by DEM Director Andrew McLeod on August 31, 1998 in direct retaliation for and as a proximate result of her ongoing protected whistleblowing activities." (ALJ EX 41) This complaint was referred to the Office of Administrative Law Judges under cover letter dated November 6, 1998. (ALJ EX 40) This Judge determined that it was judicially efficient and procedurally proper to accept this second Complaint. (ALJ EX 44)

By document dated October 14, 1998, Complainant filed a third complaint against Respondent, alleging that during the pendency of the above-referenced litigation, Respondent has continued to discriminated against her. Specifically, Complainant alleges that actions were taken by Respondent "to prevent Complainant from making further protected disclosures to federal oversight officials, explicitly requested that a manager at the U.S. Environmental Protection Agency (EPA) in Boston instructed his staff to cut off all communication with Complainant, thereby undermining Complainant's ability to do her job and further damaging Complainant's professional reputation." (ALJ EX 64) This complaint was referred to the Office of Administrative Law Judges under cover letter dated November 30, 1998. (ALJ EX 40) Again, this Judge determined that it was judicially efficient and procedurally proper to accept this third Complaint. (ALJ EX 81) Complainant's three claims were consolidated for trial.

A twenty-three day hearing was held before the undersigned commencing on December 14, 1998, in Providence, Rhode Island. All parties were present, had the opportunity to present evidence, and to be heard on the merits.

Post-Hearing Exhibits

The following post-hearing evidence has been admitted into the record:

Exhibit No.	Document Filed	Date Filed
ALJ EX 83	Notice of Reconvened Hearing.	12/18/98

EX 118	Letter Regarding Respondent's Response to Complainant's Request for Production.	1/13/99
ALJ EX 84	Notice of Reconvened Hearing.	1/29/99
ALJ EX 85	Order Regarding Scheduling.	2/9/99
ALJ EX 86	Notice of Reconvened Hearing.	3/4/99
ALJ EX 87	Notice of Reconvened Hearing.	3/5/99
EX 119[1]	Copies of Michael J. Mulhare's Notes.	3/22/99
ALJ EX 88	Order Forwarding Relevant Pages of Michael J. Mulhare's Notes.	3/22/99
CX 122	Complainant's Motion to Admit Documents into Evidence.	4/14/99
ALJ EX 89	Order Instructing Parties to Address Issues Concerning Admission of New Evidence in their Post-Hearing Briefs.	4/15/99
CX 123	Complainant's Letter Indicating a Joint Request to Extend Deadlines for Filing Post-Hearing Briefs.	4/29/99
ALJ EX 90	Order Extending Deadline for Post-Hearing Briefs.	5/3/99
CX 124	Complainant's Letter to Employer's Counsel Concerning Admission of Post-Hearing Evidence.	5/6/99
EX 120	Respondents's Motion to Admit Documents.	5/10/99
CX 125	Complainant's Counsel's Letter regarding Mailing of Post-Hearing brief.	5/13/99
CX 126	Complainant's Post-Hearing Brief.	5/14/99
CX 127	Fee Petition by Public Employees for Environmental Responsibility, Todd Robins, Attorney for Complainant.	5/14/99
CX 128	Petition for Attorney's Fee for Joel D. Landry, Esq.	5/17/99
EX 121	Respondent's Letter Filing,	5/18/99

[1] Marked for identification only.

EX 122	Respondent's Objection to Complainant's Request to Admit Documents into Evidence.	5/18/99
EX 123	Respondent's Post Trial Brief.	5/18/99
EX 124	Respondent's Motion to Bifurcate or In the Alternative To Extend Time for Final Brief.	5/19/99
ALJ EX 91	Order Scheduling Filings Related to Fee Petition.	5/20/99
CX 129	Attorney Landry's Motion to Modify and Amend Legal Fees.	5/28/99
EX 125	Respondent's counsel's letter dated June 24, 1999, regarding recent United States Supreme Court decisions pertaining to Respondent's Eleventh Amendment argument.	6/28/99
EX 126	Respondent's Post Trial Brief Re: Damages and and Attorney's Fees.	7/2/99
CX 130	Attorney Robins's letter dated June 29, 1999 relating statutory and case law citations concerning the Eleventh Amendment issue.	7/2/99
CX 131	Attorney Landry's June 2, 1999 letter citing the General Laws of the State of Rhode Island.	7/2/99
EX 127	Respondent's counsel's letter dated July 6, 1999, in response to Attorney Landry's July 2, 1999 letter.	7/8/99
CX 132	Complainant's Reply Brief in Opposition to Respondent's Post-Trail Brief Re: Damages and Attorney Fees.	7/14/99
CX 133	Amendment to Fee Petition by Public Employees for Environmental Responsibility, Todd Robins, Attorney for Complainant.	7/14/99
CX 134	Affidavit of Attorney Todd E. Robins of Public Employees for Environmental Responsibility Regarding PEER's Petition for Attorney Fees and Costs.	7/14/99

CX 135	Complainant's Reply Post Trial Brief Re: Attorney Fees of Joel D. Landry, with supporting affidavits.	7/16/99
CX 136	Complainant's Motion to Expand the Record.	7/16/99
EX 128	Respondent's Objection to Complainant's Motion To Further Expand the Record.	7/26/99

The record was closed on July 26, 1999, as no further documents were filed.

I. OUTSTANDING EVIDENTIARY DISPUTES

This matter has a number of unresolved evidentiary disputes pending, that must be resolved prior to proceeding with this Recommended Decision and Order. Specifically, Complainant has submitted two motions to admit new evidence and the Respondent has submitted one such motion; all motions have been opposed. (EX 120; EX 128; CX 122; CX 126 at 13, 21, 161; CX 136) Further, at the hearing, this Judge reserved ruling on the admissibility of a number of documents. (CX 37-38)

I find and conclude, based upon my review of the documents submitted and the arguments of parties, that it is in the interest of fairness and justice that all motions to expand this record be **GRANTED** and that all evidence be admitted. Further, I hereby **ADMIT** any and all documents for which admission was reserved at the hearing. I wish to caution, however, that this Judge has kept in mind all of the objections raised regarding specific evidence in determining the probative weight of such evidence, particularly in the case of unsigned documents, or where the opposing party did not have adequate opportunity for cross or rebuttal.

Lastly, at the opening of this hearing, I took under advisement Complainant's Motion to Compel the testimony of Director McLeod. (CX 1) I find and conclude that this record is sufficiently supported on all claims, and that the hearing testimony of Director McLeod is not necessary, especially as the record does contain his deposition testimony. Accordingly, Complainant's Motion is hereby **DENIED**.

II. SUMMARY OF THE EVIDENCE

The Rhode Island Department of Environmental Management (RIDEM) is generally designed to protect both human health and the environment, through a number of programs and divisions designed to regulate and inspect hazardous material and sites in the State of Rhode Island. One of RIDEM's programs is a hazardous waste program authorized by the Environmental Protection Agency (EPA) to implement and enforce the Resource Conservation

and Recovery Act (RCRA) in Rhode Island. **See** 42 U.S.C. § 6926; CX 99.[2] The RCRA authorizes EPA to allocate grants to authorized state hazardous waste programs to fund the development and execution of the RCRA program in such state. 42 U.S.C. § 6931. As a federally funded program, Respondent's RCRA program is required to follow federal EPA regulations and requirements relating to the allocation of such funds, and must make and meet commitments regarding programmatic activities, such as inspections and enforcement actions to be undertaken with such funds. (CX 99)[3] The EPA's enforcement response policy and guidelines provide instructions to the state as to how and when to carry out inspections and endorsements.[4] Also, the EPA maintains oversight responsibility for the RIDEM program.

Beverly M. Migliore (Complainant) received a Bachelor of Science Degree in biology and psychology from Providence College in 1977. (TR 62) Complainant then worked for approximately ten (10) years at Brown University in the Division of Geology, and is concurrently worked towards her Master's Degree in Environmental Studies. (TR 62) At the time of this hearing, Complainant had completed all her courses and is currently in the process of completing her thesis. (TR 62)

In 1986, Complainant was hired by RIDEM as an intern with the air program. (TR 62-63) From then until the present, Complainant has continued to work for RIDEM, and has risen through numerous positions to her current role as supervising environmental specialist. Specifically, Complainant, over her thirteen year history with RIDEM, has been employed as a Junior Sanitary Engineer in the RCRA program Industrial Waste Compliance (TR 63); senior sanitary engineer (TR 66); Principal Sanitary Engineer and Senior Supervisor of the RCRA program (TR 69-70); and Supervising Environmental Scientist (TR 70).

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[2] Section 405 of the Solid Waste Disposal Act is also commonly referred to as the resource Conservation and Recovery Act.

[3] Specifically, RIDEM is "designated to administer the underground storage tank program as approved by the federal environmental protection agency pursuant to the [RCRA], . . . and is . . . authorized to take all necessary or appropriate actions to secure to [Rhode Island] the benefits of this program, including participation via cooperative agreement with the environmental protection against (EPA) in the leaking underground storage take trust fund." R.I. Gen. Laws § 46-12-2(e) (1998).

[4] Complainant submitted that RIDEM "follows federal guidelines adopted by EPA in determining the appropriate enforcement response to violations of RCRA in Rhode Island. Those guidelines require that DEM respond to violations in a 'timely and appropriate' manner, which is defined in the guidelines. The guidelines also provide that an inspection of a regulated facility must serve as a 'snapshot' of the facility's compliance and that, if violations are found, DEM's enforcement reponse be based on that snapshot." (ALJ EX 2)

Complainant has had extensive responsibilities in the area of enforcement at RIDEM, including the supervision, hiring and firing of her staff. (TR 70). Further, in 1993, RIDEM underwent a minor reorganization where the Air and Hazardous Materials unit was split into the Air Resources and Waste Management division. At this time, Complainant became solely responsible for the RCRA program. (TR 70) Complainant, as Supervising Environmental Scientist, worked under the Division Chief, and had wide latitude for exercising initiatives and independent judgments. (TR 926; CX 35) Complainant described the nature of the enforcement procedures prior to the reorganization, at the hearing.[5]

In addition, Complainant also received extensive training from the EPA and other environmental agencies, through classes, conferences, and other events. (TR 64) For example, in 1992, Complainant passed a national exam and became a Certified Hazardous Material Manager. (TR 71) During this same period, Complainant was also involved on the national level, representing Rhode Island in ASTWMO (Association for States and Territory Waste Management Officials) and in NEHWMO (Northeast Hazardous Waste Managers Organization). (TR 71-72) Complainant was also utilized as an expert witness on issues related to the RCRA hazardous waste management program. (TR 73, 955, 2507) In addition to her employment, Complainant has taught college courses on hazardous waste management. (TR 73)

Complainant has submitted uncontradicted evidence that, prior to the 1996 reorganization, she had an unblemished record. Ronald Gagnon, the Division Chief with direct supervisory

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[5] Complainant testified that if faced with a violation of the RCRA, RIDEM would first issue a Notice of Violation with a penalty; then they would hold an informal meeting with violators where "[i]n almost every case we amicably resolved the disputes before they went to a hearing." (TR 74) Further, Complainant described a snap-shot inspection as one dealing with a specific day (TR 91), and she described the general procedure as follows:

> The inspectors would go out and do their inspections; they would compete their checklist, if they had any photographs, or samples or anything like that. They would put the entire package together in a file, and on a regular basis sometimes it would be daily sometimes it would be weekly, but there were no standard meetings where we would go through these. As the cases would come up and they would formulate their information package, we would sit down together in my office or their office, which ever, and discuss the merits of each action that would be taken. Generally I relied on the inspectors own judgment, because we would go through a period of training inspectors, where I would checkout an inspector, as well as EPA would come out checkout an inspectors, so we were confident that they knew what they were doing. And then we would sit down and talk and discuss what the appropriate enforcement action would be, and upon that decision they would proceed to prepare that document, for my signature.

(TR 90)

control over Complainant prior to the reorganization, testified that no disciplinary action was ever taken against her, that she performed her work well and thoroughly, and that he considered her an expert on the hazardous waste program. (TR 2507-11, 2837-38) Mr. Gagnon also testified that he never had any difficulties working with Complainant. (TR 2505*)* Further, he testified that he never recalled requiring Complainant to rewrite any enforcement documents. (TR 2538) Mr. Gagnon also testified that Complainant was a successful supervisor who handled problems and issues effectively and properly. (TR 2523) Additionally, James Fester, RIDEM's Associate Director for Regulation prior to 1996, testified that he felt Complainant was "doing a good job" prior to the reorganization, and he encouraged her to apply for the title upgrade to Supervising Environmental Scientist in 1994. (TR 75, 928)

Prior to the reorganization, Complainant was also quite successful in running the RCRA program. Between 1992 and 1995, when Complainant directed the program, RIDEM conducted an average of 87 RCRA generator inspections, 19 formal notices of violations with penalties, 64 informal letters of deficiency and 83 total enforcement actions. According to Gagnon, the enforcement cases were carried out in a timely and appropriate fashion, and none, to his knowledge, were overturned. (TR 2559-60) Complainant testified that prior to the reorganization she never had an enforcement case under her supervision overturned, dismissed or otherwise compromised as a result of incomplete or inadequate documentation by RCRA inspection staff. (TR 5132) Complainant also noted that the only complaints received during this time period were from the regulated entities themselves. (CX 126 at 7) On October 1996, EPA issued a multi-media review which reviewed files from 1994-1995 and which was generally favorable to RIDEM and its RCRA program. (CX 2) RIDEM, however, has pointed out that some criticisms were raised concerning RIDEM procedures and settlement penalty actions. (EX 80) Further, RIDEM notes that the EPA issued another audit in 1998, conducted by the EPA's Office of Inspector General (OIG), which examined RIDEM files from 1996-to early 1998. This report contained criticism of both pre- and post-reorganization cases, and shall be discussed later in this summary of evidence. (CX 29; CX 99)

Complainant has testified to a policy change and reorganization that occurred within RIDEM in and around 1996. The crux of this case, and Complainant's allegations, concerns those changes and Complainant's reaction to those changes both before and after the official reorganization. Complainant testified that a general policy change occurred after Lincoln Almond was elected Governor of Rhode Island, in 1994. Mainly, she noted that Gov. Almond "ha[d] no love" for RIDEM (TR 1010-11) and that the new RIDEM Director, Tim Keeney, emphasized that formal enforcement was disfavored, and that the new RIDEM policy would emphasize informal discussions with polluters as a way to resolve violations. Director Keeney planned the reorganization to achieve these goals.[6]

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[6]I pause to note that Complainant testified that during the summer of 1996, she was unaware "that a political objective to reduce and de-emphasize formal environmental enforcement was driving the reorganization." (TR 402) Nevertheless, shortly thereafter she began to fully appreciate the (continued...)

Complainant testified that she has always maintained had a good working relationship with the EPA, and that she had developed a close and constructive professional working relationship with EPA regional oversight officials during her tenure as RCRA program supervisor. (TR 5121) Complainant testified, however, that when Rhode Island made a policy shift in 1995 with Governor Lincoln Almond, she was increasingly perceived by RIDEM senior management as "pro-EPA." (TR 5122) After the 1996 reorganization, Complainant said that the relationship between RIDEM and the EPA deteriorated, and her continued good relations with EPA officials placed her in an awkward position with her new supervisors, whose policies and actions were the subject of substantial EPA criticism. (TR 511-22)

Planned Reorganization

In late 1995 and early 1996, RIDEM began planning a major reorganization. At that time, Director Keeney designed the reorganization to make RIDEM more structurally resembling both the new Region One of the EPA and the Connecticut Department of Environmental Management. (TR 936; 1422-23)[7] RIDEM contends that the reorganization sought to make environmental enforcement in Rhode Island consistent across all of the media programs. (TR 936) The reorganization was also designed, like the Connecticut model, to concentrate the enforcement activities of RIDEM into one office, whose objective was to provide violators a "chance to correct" their mistakes, rather than taking "heavy-handed enforcement." (TR 1011) The reorganization affected all aspects of RIDEM, and over 500 employees, although our focus will only concern a few areas, namely the Office of Compliance and Inspection (OCI) and the Office of Waste Management (OWM). (TR 397-98) Mr. Edward Szymanski, an Associate Director, was appointed by Director Keeney to a panel to draft the reorganization. He testified that at no time in the decision making process was Complainant's name discussed. (TR 1885-86) He also stated that there were no conversations about compliance versus enforcement at this time. (TR 1425) Mr. Keeney left in early 1997, a departure which Mr. Szymanski testified created further problems. (TR 1892)

As noted, at this time Complainant was responsible for running the RCRA program at RIDEM. This responsibility encompassed both enforcement and permitting related to hazardous waste. The proposed reorganization was to affect a great deal of changes for Complainant. Namely, she would no longer be responsible for the RCRA program, but rather, that program would be divided in two, with the permitting functions going to OWM, while the Complainant, and enforcement issues, would fall under the OCI. Complainant's responsibilities were also proposed to be expanded from focusing solely on hazardous waste, to include other media programs. Further, Complainant would also no longer be reporting directly to the Associate

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(...continued)
negative consequence the changes would have on the RCRA program.

[7] The proposed reorganization was eventually cited with approval, by the EPA. (EX 80 at 10-11)

Director, but would have an additional level of supervision. That supervisory position was to be assigned to Mr. Michael Mulhare.

RIDEM states that the reorganization required that supervisors be selected with both engineering skills and enforcement backgrounds. (TR 949-51) The two main supervisors above Complainant were Michael Mulhare and Mr. Dean Albro, the associate Director.

Mr. Mulhare was designated to be a Principal Environmental Scientists with supervisory responsible for the Emergency Response team, the Senior Air Quality Specialists, and the Principal Sanitary Engineer over the State/Municipal Facilities section. (CX 35) He was also Complainant's immediate supervisor. RIDEM posits that Mr. Mulhare was selected, in part, because of his history of aggressive enforcement. (TR 993-94) Further, he has a master's degree in civil and environmental engineering. (TR 3407) Mr. Mulhare's prior experience was as a licensed professional engineer, focusing on groundwater contamination and oil spill clean-up issues. (TR 3405-20) He did not have experience working with a prescriptive, federally funded regulatory program involving routine inspections and enforcement of violations. (CX 101) Despite RIDEM's claim that Mr. Mulhare was enforcement-minded, testimony presented indicated that Mr. Mulhare's prior work had an emphasis on cleaning up sites on a voluntary basis, and that he preferred wearing the so-called white hat, rather than the black hat. (TR 1272-73, 5117) Complainant also offered testimony that she felt that Mr. Mulhare had a general reputation for being vindictive, and keeping lax hours. Further, Ms. Joan Taylor, an RCRA inspector under Complainant, testified that she suspected Mr. Mulhare of attempting to distort and tarnish her performance record in retaliation for her disagreements with him on a particular enforcement case. (TR 1223-25) Mr. Mulhare reported directly to Mr. Dean Albro.

Mr. Albro, at this time, was the chief of RIDEM's wetlands programs. He had no training or experience with the RCRA program, or any federally-authorized, federally funded enforcement program, because the wetlands program was state run. (TR 4736) Mr. Albro was slated to become the Chief of the OCI.

Complainant's Initial Reaction

In June of 1996, Complainant learned of the proposed specifics of the reorganization from Mr. James Fester, the Association Director for Regulations. (TR 74-75) Mr. Fester, incidentally, suggested that Complainant be promoted to Supervising Environmental Scientist, as part of the reorganization. (TR 75) Complainant testified that Mr. Fester told her that, essentially, her RCRA job would not change except that she would not longer be involved or responsible for the permitting section of the program. (TR 85) He did, however, inform her that she would gain the additional responsibilities of two additional programs, of which she did not have any supervisory experience: underground storage takes, and the solid waste program.. (TR 85)

Between June and September 1996, Complainant raised a number of concerns about the proposed reorganization. She expressed her concerns to a number of individuals, but mainly Mr.

Albro and Mr. Fester. (TR 81; CX 4; CX 102) Complainant's concerns included the following: the reorganization would affect a change from enforcement to compliance which would compromise and violate the RCRA; that her position was essentially being downgraded because she would be subject to an additional layer of supervision, in contrast to her job description, a change which she viewed as a demotion (TR 412, 424); that Mr. Mulhare should not be her supervisor due to his lack of experience with the RCRA, and his anti-enforcement reputation (TR 88, 444); she also expressed concern over potential enforcement problems and conflicts that she envisioned with Mr. Mulhare as her supervisor because he would not be a strong advocate of enforcement (TR 88-90; TR 464); that her new duties would take her away from her area of expertise within the RCRA and would result in a waste of her talents (TR 82-85); and that the decreased staff would result in a smaller field presence. (TR 83-84; 402)[8]

Although Complainant raised her concerns, the RIDEM feedback and reaction was discouraging. For instance, on June 6, 1996, Mr. Albro requested that Complainant provide a list of suggestions to make the new, reorganized office work most effectively. (CX 102) Complainant then drafted a memorandum to Mr. Albro stressing that her institutional knowledge of the RCRA program was essential to maintaining the program's integrity. (CX 102) Shortly thereafter, however, Complainant learned that the final reorganization plans ignored her proposals. (EX 3)

Complainant testified that Mr. Fester was not responding to her concerns. She testified to feeling like she was being unfairly treated because her position was being threatened by the reorganization, and because she could not get her concerns addressed. Mr. Fester testified that Complainant did raise concerns about "an impossibility of performance," created by the reorganization. (TR 936) Eventually, Complainant spoke with Mr. Fester on August 9, 1996, and he told her that he would bring her concerns to Mr. Edward Szymanski, an Associate Director with RIDEM. At this time, Mr. Fester indicated that he was afraid that Complainant was setting him up for a lawsuit. Complainant continued to raise her concerns even after this meeting.

At the hearing, Complainant testified that she did not feel retaliated against because they did not take her input on the reorganization plan, stating, "they were free to reorganize in any method they wanted to." (TR 430) Also, in mid-1996, Complainant did not believe that the reorganization would have an adverse effect on enforcement actions, although, she did have concerns about under-staffing. (TR 431-436) Complainant also testified that prior to September 23, 1996, Complainant said that she had a "fine" relationship with both Mr. Mulhare and Mr. Albro, and that they did not discriminate or retaliate against her at that time. (TR 492-93)

Immediately prior to the effective date of the reorganization, an issue arose involving Complainant's office space. RIDEM had just moved offices, and Complainant raised a dispute concerning the size of her office. (TR 446) On August 6, 1996, Complainant learned that she

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[8]Complainant also was concerned that she was being discriminated against based upon her gender, and noted such on an EEO survey distributed by the Human Resources office. (EX 109)

was assigned to a small office, in which she stated could not adequately house her RCRA files, or to allow her to hold meetings and consultations. (CX 10) Complainant complained to Mr. Albro about her office space, but his response was, "too bad." (CX 102) Complainant then sent a memo to Mr. Albro, and copied Mr. Fester, RIDEM's Chief Counsel Kendra Beaver, and Human Resources Chief Melanie Marcaccio, indicating that the office size was merely further evidence, as with the demotion, of discrimination. (CX 10) Ms. Marcaccio, however, stated that the office space was allocated in terms of pay grade, but that after offices were assigned, and before RIDEM moved in, Complainant's office was made smaller by the owners of the building, unbeknownst to RIDEM. (TR 2294)

Official Reorganization

On September 23, 1996, the reorganization became official, as authorized by Executive Order No. 96-8, issued by Governor Lincoln Almond. (EX 2; EX 3) Mr. Szymanski stated that over 100 employees of the 500 staff were shuffled in the process. (TR 1890) The reorganization, in part, removed the inspection and enforcement components from the Department's environmental regulatory programs, and placed all those functions in the centralized Office of Compliance and Inspection (OCI). Complainant's RCRA program was thus split apart with the policy and permitting function, together with the non-enforcement functions associated with the solid waste and UST programs, now falling under the newly formed Office of Waste Management (OWM), while the RCRA generator enforcement program, as well as the enforcement components of solid waste and UST, were made subcomponents of OCI. (TR 903)

Complainant's position as Supervising Environmental Scientist was re-assigned to the OCI. (EX 2) Complainant's supervisory responsibilities were decreased, and she was now responsible for only supervising four inspectors in the RCRA hazardous waste generator, UST and sold waste enforcement sections. Complainant testified, however, that she lacked both training and experience as to the newly assigned UST and solid waste enforcement. (CX 21) Further, Complainant's chain of command also changed. Whereas, prior to the reorganization, Complainant reported directly to a division chief, after the reorganization, Complainant was placed under the immediate supervisory control of Michael Mulhare, the Supervising Sanitary Engineer. (CX 35; EX 2) Complainant testified that she was the only Supervising Environmental Scientist at RIDEM who was placed in a position subordinate to another supervisor, another example of disparate treatment. (TR 105; EX 3)

Complainant's Post-Reorganization Reaction

Complainant continued to raise her concerns after the reorganization became official, both within and outside of RIDEM. In October of 1996, Complainant took her complaints to Ms. Marcaccio, in Human Resources, particularly raising her concerns about Mr. Mulhare's enforcement abilities. (TR 121) Ms. Marcaccio testified that Complainant expressed her concerns about reporting to Mr. Mulhare because Complainant said that he was a lair and untrustworthy, and that he had little knowledge of the RCRA program. (TR 2193) Complainant

also drafted a memorandum expressing her concerns about the integrity of the program, and relating to aspects where she felt she could be most useful. (TR 121) Complainant also expressed her fear that she was being set up for termination, which Ms. Marcaccio later denied. (CX 102)

Ms. Marcaccio, in light of Complainant's concerns, scheduled a meeting on October 3, 1996, between herself, Complainant, Mr. Albro, Mr. Szymanski and Mr. Fester. (TR 2193) At this hearing Complainant again expressed her concerns that the reorganization was adversely impacting both her career and the RCRA program. (TR 102) Complainant argued against Mr. Mulhare as a supervisor based on his strong dislike for enforcement actions. (TR 102, 2198) Further, Complainant discussed the change in procedures that had occurred since the reorganization went into effect. Namely, Complainant noted that Mr. Mulhare had returned several reports for further information, and multiple reviews, which she found both violated the prior procedure regarding snap-shot inspections, and also violated the EPA and RCRA's requirement of timely enforcement. (TR 134-38)

Complainant also testified to the mood of the October 3, 1996 meeting. Specifically, she complained that the others in attendance were "very abusive" and confrontational, and told her that she had no redress for her complaints. (TR 122) Complainant noted that Mr. Szymanski merely demanded that she give 110% in her current position. In all, Complainant testified that she "felt very attacked and demoralized." (TR 122-23)

Ms. Marcaccio also testified about the meeting, noting that Complainant was extremely emotional. Ms. Marcaccio stated: "She cried very hard, had trouble speaking, had to stop and calm herself down before she could continue." (TR 2196) As a result, Ms. Marcaccio suggested that Complainant contact RIDEM's Employee Assistance Program (EAP). (TR 2199-2200). In fact, Ms. Marcaccio claims that she called EAP for Complainant because Complainant was so agitated, Ms. Marcaccio had to dial the phone. (TR 2299-2300).

Complainant sought treatment for her emotional condition, which she attributes to her "being constantly questioned, criticized, attacked. My work was being undermined by my superiors. My subordinates were losing respect for me." (TR 383) During the next few months Complainant had sporadic contact with EAP. EAP counselor, Judith Hoffman, advised Complaint to seek treatment through her own health insurance program with Harvard Community Health. (TR 384) Complainant did, and began seeing both Ray Cooney and also Dr. Carre who both suggested that she get away from the stressful environment. (CX 37) Additionally, within days of these events in early October, Complainant's husband, Joe Migliore, who also works at RIDEM, approached Mr. Fester and had a confidential conversation with him to advise Mr. Fester of the stress and health problems Complainant was experiencing as a result of the Department's treatment of her, and asked whether there was anything Mr. Fester could do. (TR 990) Complainant testified that she continued, and continues, to have stress related problems allegedly caused by Respondent's conduct. In fact, from September to mid-October of 1997, Complainant was out of work for five weeks on stress leave. (TR 162)

During this period, Ms. Marcaccio would often respond to EAP calls and provide information on Complainant's mental state. (TR 2214, 2303) During these meetings, Ms Marcaccio passed along information concerning Complainant's alleged problems at work for inclusion in Complainant's file. (CX 39) For example, an October 10, 1996 entry notes that Ms. Marcaccio described Complainant as an "aggressive" and "headstrong" woman who "doesn't like/respect her new boss who threatened to quit" and "exaggerates his mistakes." (CX 39) Further, Ms. Marcaccio even divulged to the counselor the purported contents of the supposedly confidential conversation between Complainant's husband and Fester, stating that "husband went to [associate director] and said marriage and health compromised." (CX 39) Finally, Marcaccio noted that "some directors want to discipline her for not assuming her responsibilities and moving on with the reorganization." (CX 39) Complainant was unaware that Ms. Marcaccio was making these phone calls and even talking to the EAP counselor.

Following the October 3, 1996 meeting, Complainant continued to raise her concerns to RIDEM employees. On October 28, 1996, Complainant spoke with both Mr. Albro and Mr. Szymanski to report that Mr. Mulhare was micro-managing her and leaving her out of the loop on decisions. (CX 102) Around this time, Mr. Szymanski advised Complainant to bring her concerns directly to Mr. Albro, and that Mr. Mulhare would be subject to some form of discipline if he continued to antagonize her.

Complainant continued to draft numerous memoranda addressing her concerns with the reorganization and Mr. Mulhare's adverse effect on the RCRA. Complainant testified that Mr. Mulhare would review cases and order Complainant to weaken the language in enforcement documents. (TR 500) Additionally, both Mr. Albro and Mr. Mulhare began sending enforcement documents back for revisions, and also requiring multiple re-inspections of facilities. Complaint testified that she and her staff felt that their compliance inspections were being compromised by these instructions. (TR 5137) Complainant also said that she and her staff were confused as to the new rules that Mr. Albro and Mr. Mulhare sought to put in place. (CX 103; CX 79) Complainant's main concern was that the new procedures were essentially inconsistent with, and inappropriate for, the requirements of the RCRA program, and that the new "enforcement" policy was actually preventing enforcement from being completed in a timely and appropriate fashion. (TR 5133) Complainant also voiced concerns that she was being placed in a situation by her superiors where she was being set up to fail. In support, she noted that she was placed in a working environment with Mr. Mulhare, despite the known significant differences in their beliefs as to how the RCRA program should be enforced. Further, Complainant argues that she was given conflicting or untruthful messages from her superiors on how to proceed with specific cases. She also noted that it was well known that her post-reorganization position conflicted with her job description, in terms of her supervision.

Complainant testified that during this period, not only was she raising concerns, but she was also being subject to discriminatory treatment. She testified that her opinions were not listened to, and that she was excluded from meetings. Further, she stated that her contact with the EPA, and other staff, were decreased and tightly controlled. Complainant also stated that she

was repeatedly denied permission to attend professional meeting as she had previously done, although RIDEM explained this on cost-saving grounds. (EX 39) These complaints were made known to Mr. Mulhare, through other supervisors, and a handwritten note from Complainant that may, or may not, have been intended for his eyes.[9]

Complainant's concern that the RCRA program's goals could not be compatible with Mr. Mulhare's enforcement policies made Mr. Mulhare uncomfortable. (TR 4032) In fact, in the fall of 1996, Mr. Mulhare concluded that Complainant would be the "inappropriate person" for the job, despite her long experience and expertise with the RCRA program. (TR 3902-03) In an October 29, 1996 memorandum to Mr. Szymanski, Mr. Mulhare indicated that Complainant created "personnel problems" and was the "crux of the problem" whose "impact on the program needs to be limited not expanded." (CX 11)

Officials with the EPA were also aware of Complainant's concerns, and problems stemming from the reorganization with RIDEM. Complainant's position required a great deal of contact with EPA officials, and she spoke with Richard Piligian, of the EPA's RCRA oversight office for Rhode Island, and told him that she did not feel that RIDEM's RCRA work was proceeding appropriately and in a timely manner. (TR 132) According to Complainant, Mr. Piligian had inquired of Mr. Fester whether a change in enforcement philosophy had occurred. (TR 5123) Mr. Fester allegedly denied any change, prompting Mr. Piligian to comment the same day to Complainant, "Do they think we're idiots?" (TR 5124)

The major conflicts between Complainant and RIDEM have been well documented in this record through numerous RIDEM enforcement cases where disagreements arose. I pause to note that this Court's authority does not encompass the issues of which party was correct regarding the substantive decisions or actions taken in RCRA enforcement cases. Rather, this Court's concern is only whether or not Complainant was discriminated or retaliated against for engaging in protected activity. Thus, while I have reviewed closely this entire record, in the interest of both

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[9] On December 15, 1996, Complainant wrote a list of her conflicts and problems with Mr. Mulhare. This lists included such information concerning Mr. Mulhare's lack of qualifications to head the RCRA enforcement program, and also listed problems affecting her, such as "assignment of menial tasks, cutting her out of the loop, no recognition of her position, problems with enforcement issues, slows down process, denies requests, second guesses her decisions, comments in writing to others when she requests a meeting with him, obstructionist, and micro manages." (CX 101; CX 102) Complainant testified that one week later, on December 23, 1996, she found the notes in her mailbox, along with a note from Mr. Mulhare. (CX 101) His noted stated, "I believe you left this in my office[,] was it something you wanted to discuss??" (CX 101) Mr. Mulhare testified that he found the notes in his mailbox, along with other evidence. (TR 3515) Complainant, however, suspected that Mr. Mulhare stole the notes. Mr. Mulhare did state that Complainant's notes were "not for his eyes" but he still copied them for himself and Mr. Albro. (TR 4170) Mr. Mulhare testified that he copied them based on fears that the Complainant issue would "escalate."

brevity and clarity, I shall only summarize those enforcement cases and conflicts which have the most bearing on Complainant's claims and RIDEM's defenses.

Following the reorganization, Complainant continually and consistently raised objections to RIDEM's enforcement actions under the RCRA, as well as other inappropriate activities. Specifically, Complainant complained that Mr. Mulhare and Mr. Albro were micro-managing her and her staff, and subjecting them to new and cumbersome procedures. These actions, Complainant alleged, prevented RIDEM from taking timely and appropriate enforcement actions in violation of the RCRA, and exacerbated the threat to human health and the environment.[10] Complainant also opposed re-inspections and multiple follow-up investigations, which ignore the traditional snap-shot inspection procedure, and serve as an impediment that overly delays enforcement, allowing violators multiple opportunities to clean up, absent penalty. She also raised concerns about the misuse of federal monies for non-federal RCRA programs. Complainant raised these issues to several members of senior management at RIDEM, including Mr. Mulhare, Mr. Albro, Mr. Szymanski, Ms. Marcaccio, Director Keeney, as well as officials at the EPA. Complainant testified that her concerns were being ignored, and therefore, on January 29, 1997, she contacted Respondent's Equal Employment Opportunity Office to inquire about filing a discrimination complainant. On February 5, 1997, she submitted a Complainant Information Form to the Office of Human Resources. (EX 39)[11]

Investigation of Complainant in 1997

In light of Complainant's continued complaints, and the expected filing of an EEO complainant, the RIDEM supervisors called a meeting in January 29, 1997 to discuss Complainant's situation, and to conduct an investigation of her activities. The meeting was attended by Mr. Albro, Mr. Szymanski and Ms. Marcaccio. At the meeting, the parties began gathering information concerning Complainant and developed a plan to investigate Complainant. At the conclusion of the meeting, the parties agreed to meet again to discuss their findings and determine an appropriate level of discipline.

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[10] Complainant's concerns were not merely that the new supervisors were anti-enforcement, rather her complaints concerned where RIDEM took action that violated the RCRA and was opposite to prior established procedure.

[11] Ms. Marcaccio later told Complainant that if she wished to file with Rhode Island's Human Rights Commission, she would need to file a different complaint form. (EX 47) Complainant then re-filed with the Human Rights Commission, alleging that she was demoted and "subject to discrimination and harassment as the result of [her] expression of . . . dissatisfaction." Subsequently, on February 5, 1998, the Human Rights Commission issued Complainant a right to sue letter indicating that it was declining to investigate Complainant's 1997 discrimination complaint. Thus, Complainant, as a non-union employee, would have to fund any potential discrimination suit.

Following the meeting, Ms. Marcaccio contacted the EAP to advise that Complaint was engaging in "extremely emotional" behavior, and alluded to problems with Complainant's mental health. (CX 39; TR 2211)[12] Further, Mr. Albro meet with Terry Gray, Martin Cappelli and James LaForge, requesting that they produce memoranda on any issues they have concerning Complainant. (EX 7; CX 57; CX 58)

Subsequently, on February 17, 1997, a meeting was held between Mr. Albro, Mr. Mulhare, Mr. Szymanski, Mr. Fester, Ms. Marcaccio and Mrs. Kendra Beaver, RIDEM's Chief Legal Counsel. The purpose of the meeting was to provide Mr. Albro and Mr. Mulhare an opportunity to discuss their conflicts with Complainant, including the fact that she sent a lot of memos (CX 40), and that she often took contrary positions on cases. (CX 15; CX 103). Mr. Albro and Mr. Mulhare also shared the criticism of Complainant and information gathered during their investigation. (TR 4193) Specifically, the conflicts related to the following issues: (1) the 1996 Financial Summary Reports; (2) Criminal Investigatory Unit complaints; (3) the unauthorized use of stationery; and (4) the Hellested Issue.

(1) Financial Summary Report Issue

Mr. James LaForge, of RIDEM's Business Affairs Office, spoke with Mr. Albro, and prepared a memorandum describing a confrontation he had with Complainant concerning the 1996 Financial Summary Reports, and his belief that Complainant was taking her complaints to the EPA.

By way of background, the issues surrounding the 1996 Financial Summary Report (FSR) are adequately described by Attorney Robins, in his July 15, 1998 letter, and shall be adopted, and supplemented herein as needed to put this issue in proper perspective. In August 1996, during the reorganizations transition period, Associate Director Fester requested that Complainant submit to EPA Region One an FSR regarding RIDEM's federal RCRA grant monies. Mr. Fester had asked Complainant to perform this function, because prior to the reorganization, Complainant had been responsible for preparing the yearly fiscal reports for the EPA. (TR 100-01) Complainant's report, approved by Mr. Fester and submitted to the EPA, reflected a balance of $105,557.01 of unspent funds by mid-October. (CX 9; CX 30) On January 20, 1997, the Office of Waste Management, who assumed responsibility for the financial report after the reorganization, submitted a second FSR for the same period. This FSR, however, reported a carry-over of $13,000.00. (CX 30; CX 9) Therefore, a dispute arose concerning the discrepancy of over $90,000.00 between the two FSR. (TR 98)

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[12] Specifically, Ms. Marcaccio informed the EAP, on January 29, 1997, that Complainant had interfered with a criminal investigation, wrote a letter to a fellow employee threatening a lawsuit on RIDEM stationery; called the EPA to investigation RIDEM, and went to the EEO with a harassment complainant. (CX 39) Ms. Marcaccio never raised these issues with Complainant. (TR 2213)

The EPA, upon receipt of the two conflicting FSRs, undertook an investigation as to whether RIDEM was allocating the federal RCRA grant properly, and federal auditors looked into the issue. (TR 537) On March 7, 1997, Bob Mendoza, the EPA Rhode Island State Program Manager, wrote to Mr. Fester noting that the apparent "shift" in funds was made without approval from the EPA, and also indicated that RIDEM would have to reallocate the carry over money. Mr. Mendoza then requested a detailed accounting of the cost shift.

Complainant testified that when she learned of the discrepancy, she contacted her counterpart in OWM and the financial/accounting officer who had prepared both FSR's. She testified that she was treated poorly by both individuals, and never received any explanation for the discrepancy or an accounting of the missing grant money. In fact, On January 22, 1997, Complainant was confronted by James La Forge of the Business Affairs office about the FSR issue. Mr. LaForge has felt that the EPA investigation was due to Complainant, based upon her history of pointing out grant money issues to the EPA. (TR 1263-65; EX 39; CX 7) On January 22, 1997, Mr. LaForge told OCI administrator Barbara Raddatz that "someone gave EPA an anonymous tip that RIDEM is cooking their books, and it must be Bev." (CX 103; EX 39)[13] Complainant stated that she inquired about the discrepancy between the two FSR, reminded him of the EPA fund-shifting rules and stated that someone would have to answer for the discrepancy. Complainant stated that Mr. LaForge then "flew off the handle" and informed her that Terry Gray instructed LaForge to get rid of the RCRA carry-over money. (TR 5165; CX 103)

On February 5, 1997, Mr. Albro met with LaForge, who spoke of the carry-over related to the 1996 FSR. (CX 57)[14] On February 11, 1997, LaForge provided Mr. Albro with a memo relaying the "basic context" of a conversation he had with Complainant over this issue. According to Mr. LaForge, Complainant asked him about the carry-over discrepancy, and about how the money was spent. Mr. LaForge indicated that the Division Chief for OWM instructed him to transfer excess state expenditures to portions of the federal grant. (EX 58) Mr. LaForge then indicated that Complainant became upset, since he did not have the authority to take such action. (EX 57; 58) Mr. LaForge further noted that Complainant made statements to the EPA which prompted the federal investigation of the FSR carry-over discrepancies.

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[13] At the hearing Barbara Raddatz, an Administrative Officer in the Office of Compliance and Inspection, testified that she worked with Complainant under RCRA "in terms of putting together the figures and determining what the expenditures were going to be." (TR 1260-61) She worked on grants from 1993 on, and she and Complainant would raise concerns if there was a question of inappropriate expenditures.

[14] Apparently soon after, Barbara Raddatz saw LaForge waving Complainant's time card, and noted that Complainant had made a mistake with a cost code. According to Ms. Raddatz, LaForge stated: "I've got that bitch" and "she ought to be fired." (TR 1266) This was confirmed by LaForge. (TR 5167) Ms. Raddatz also noted that Complainant was telling others that he was in a "screaming match with Complainant." (CX 103, 2/7/97) Ms. Raddatz raised this to Mr. Albro, who dismissed it, stating that she had no proof. (CX 103, 2/7/97)

(2) Criminal Investigatory Unit Complaints

The next issue discussed concerned three complaints raised by Martin Cappelli, the Chief of the Criminal Investigations Unit (CIU) at RIDEM. Mr. Cappelli's first issue concerned a suspicion he had involving Complainant's action in the 1995 Chase Paint case. Apparently, in June of 1995, CIU had executed a search warrant at the Chase Paint Facility and discovered a wide range of health, safety and environmental violations. (EX 35). John Leo, from RIDEM's emergency response team made sworn statement to investigators that samples from the site appeared to be hazardous waste. (EX 35) In August, 1995, however, Complainant determined that the materials were paint "product," rather than "waste," based upon representations by the company's owner and according to normal practice and procedure. (EX 35; TR 1336) As a result of Complainant's jurisdictional determination which was approved by her chain of command at the time, CIU was unable to prosecute Chase Paint for criminal RCRA violations, and Complainant alleges that Mr. Cappelli was upset because his hopes for a high-profile "bust" were dashed. In January of 1997, Mr. Cappelli suggested to both Mr. Mulhare and Mr. Albro, that Complainant had close ties to Frank Chase, the owner of the Chase Paint facility, and that Complainant may have altered files in order to support her exculpatory waste determination. (TR 4216)

Next, Mr. Cappelli relayed a meeting between Complainant and Matt Patterson, of the CIU staff. Mr. Cappelli stated that around December 1996 and January 1997, Mr. Patterson had requested hazardous waste manifest data from Complainant, which Mr. Cappelli noted was a typical request. At that time the manifest data was housed in the OWM, so Complainant referred him to OWM, but stated that she would make available any information from the RCRA enforcement files. (CX 103, 3/3/97) Mr. Cappelli, however, told Mr. Albro, Mulhare, and others, that Complainant had been territorial and misleading by suggesting that she retained control of the manifest data. (CX 103)

Finally, Mr. Cappelli stated that Complainant had interfered with a criminal investigation by forbidding her staff from speaking to investigators. (TR 2317; EX 7) Complainant testified, however, that she never did forbid any meetings, rather she merely requested to be present or informed of any such meetings. Complainant stated that this was done because Robert Nero,[15] an inspector on Complainant's staff, was uncomfortable being interviewed by criminal investigators because of a previous occurrence where he was threatened with perjury. Complainant stated that she offered to sit in with Mr. Nero on his interviews. (CX 103, 3/3/97)

At the hearing, Complainant strongly disagreed with Mr. Cappelli's criticisms, and further stated that Mr. Mulhare and Mr. Albro were both aware of Mr. Cappelli's retaliatory motives. She stated that his allegations were false, nevertheless they were passed along at the February 17, 1997 meeting to justify action against Complainant. Specifically, Complainant notes that both Mr. Mulhare and Mr. Albro knew that hazardous waste manifests were housed in OWM, and that

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[15] Mr. Nero is a hazardous waste inspector in the OCI, and Complainant was his supervisor. (TR 1020-23)

Complainant would have had absolutely no reason to claim she still had control over them. Additionally, Mr. Mulhare, in particular, knew that Mr. Nero expressed to Complainant the he felt intimidated by criminal investigators, because Complainant had explained the situation to Mulhare. Finally, Complainant denied any wrong doing in the Chase Paint matter.

(3) Unauthorized Use of Letterhead

The next issue discussed concerned Complainant's misuse of RIDEM letter-head in a correspondence to Janice Angell. Ms. Angell was a former subordinate of Complainant's, who had been previously disciplined by Complainant. Ms. Angell was subsequently transferred to the Office of Waste Management. Complainant testified that she had heard a from a colleague that Ms. Angell was making disparaging personal and professional comments about Complainant. (TR 511; EX 5) Complainant then wrote Ms. Angell a memo stating that she was aware of Ms. Angell's comments, and that if such actions continued, Complaint would "have no alternative but to contact my attorney to seek legal remedy." (EX 5)

Ms. Marcaccio learned of Complainant's memo from Ms. Angell's union representative, and she then instructed Mr. Albro to discuss the matter with Complainant. (EX 5) On December 19, 1996, Mr. Mulhare and Mr. Albro called a meeting with Complainant to discuss this issue, and to specifically instruct her not to use state letterhead to threaten legal action against another employee. (TR 514, 4165-66) Complainant agreed not to do it again. Respondent described the meeting as an official disciplinary counseling session, and that Complainant was advised to go through her supervisors when a dispute arises involving an individual in another unit. (TR 4166) Complainant, however, testified that Mr. Albro merely made an off-hand comment at the end of the meeting that, "If you have a problem with something, let Mike handle it." (TR 5159-60)

(4) Hellested Issue

The final issue addressed concerned Complainant's interaction with Leo Hellested, a Supervising Engineer overseeing the RCRA component of Office of Waste Management. During the reorganization period, Complainant had close contact with Mr. Hellested concerning a number of issues. On January 15, 1997, Complainant sent a memo to Mr. Hellested concerning a few "ongoing coordination and division-of-labor issues between their two units." Two weeks later, a problem arose regarding one of the issues, and Complainant went to Mr. Mulhare to address the issue. (TR 5160, CX 103, 1/28/97)

On January 28, 1997, that same day, Complainant called Mr. Hellested to check on an unrelated issue. Complainant then expressed concern about reports that a member of Hellested's staff was telling other staff that Complainant's response letter on the treatment-in-tanks issue was incorrect and too harsh on regulated entities. (CX 113) Complainant, however, stated that her letter was correct, and he offered to help Mr. Hellested's staff member on the issue. According to Complainant, Mr. Hellested became very defensive and territorial, and stated that Complainant should probably not be involved. (CX 103, 1/18/97; CX 113). As to Complainant's request to

help Mr. Hellested's staff, he screamed at Complainant that she should not talk to his staff and then ended the call. Both Complainant and Taylor remember that at no time during the conversation did Complainant raise her voice. (TR 1216)

Complainant stated that she was appalled at Hellested's tone and manner, and immediately called Terry Gray, Mr. Hellested's supervisor, and left a message on his voicemail stating that she had offered her assistance to Mr. Hellested and then had been verbally attacked by him. (CX 103, 1/28/97). At the hearing, Complainant acknowledged that she may have said, "Who the hell does he think he is?," referring to Mr. Hellested. (TR 5163) After leaving the message, Complainant immediately went to Albro's office to report the incident to him, but he had left for the day. (TR 5162)

The next day, Complainant again went to Mr. Albro's office and learned that Mr. Gray had already contacted Mr. Albro about the confrontation and voicemail message. (CX 113) Mr. Albro and Mr. Mulhare questioned Complainant about the incident. (CX 113) Complainant presented her side of the story and them asked them if they would supporter her. (CX 113) Mr. Albro responded that it was "premature" to discuss support, since the whole story was not known. (CX 3)

Written Reprimand

The individuals at the February 17, 1997 meeting, after reviewing and discussing the aforementioned information, determined that a written reprimand would be issued against Complainant, relying in particular on the statements made by Mr. Hellested and Mr. LaForge. (EX 8)[16] Regarding the EEO complaint, Ms. Marcaccio stated that she would draft a memorandum for Mr. Albro requiring Complainant to produce a note from her doctor prior to allowing her to do any work in the field. (CX 40) At no point was Complainant afforded the

[16] Complainant challenges this decision on a number of grounds: (1) Mr. Fester who was aware of the FSR issue and also Mr. LaForge's reputation, agreed that Complainant should be reprimanded because she "hunted out" LaForge. (TR 960); (2) Mr. Szymanski took all the division chiefs at their word and did not discuss the issues with Complainant prior to discipline. (TR 1469); and (3) "despite Albro's knowledge about LaForge's meanspirited comments to Raddatz (TR 1267), and both Mulhare's and Albro's knowledge regarding Complainant's version of the incident with Hellested (CX 113), they failed to defend Complainant.

opportunity to respond to the challenges.[17] Prior to the 1996 reorganization, Complainant was never disciplined or reprimanded for communications with the EPA. (TR 112)

On March 3, 1997, Complainant was issued a written reprimand concerning the LaForge and Hellested confrontations, and because she was not following supervisors' orders regarding refraining from contacting outside staff directly. (EX 8; TR 142) The reprimand was grounded upon allegations of Complainant's unprofessional behavior, her actions exceeding authority, and her general confrontational nature. Ms. Marcaccio explained that the reprimand was to remain in Complainant's file for one year, in order to justify more severe discipline if further infractions occurred within that period. (TR 2234)

Complainant alleges that the Respondent violated its own policies and disciplinary procedure in issuing her a written reprimand.[18] Complainant testified that she never received an oral reprimand or counseling. Ms. Marcaccio testified to RIDEM's personnel policy which dictates that "progressive discipline" be used "where practicable," and employee usually receives an official counseling from his or her supervisor as the first step toward discipline, followed by an oral reprimand if further infractions occur, followed by a written reprimand and then more serious discipline, such as suspension and termination. (TR 2220) Ms. Marcaccio testified that RIDEM departs from the usual disciplinary progression when the employee's conduct is severe enough to warrant it. (TR 2222) Complainant, however, testified that she was never counseled or reprimanded orally, and also that she never was notified that disciplinary action was being considered. (CX 103, 3/3/97; CX 49) Thus, she did not have an opportunity to respond to the allegations. (TR 1470, 2224) Ms. Marcaccio, however, stated that Respondent has no legal duty to inform an employee prior to issuing a reprimand. (TR 2325) Further, Mr. Albro and Mr. Mulhare felt that their December 19, 1996 conversation served as an oral reprimand. Ms. Marcaccio also stressed that Complainant never contested, denied, or appealed the March 1997 letter. (TR 2310)

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[17] The extent of Complainant's knowledge of these meetings and the investigation is not known. Shortly after this February meeting, however, Mr. Cappelli continued to ask questions on Chase Paint, upon Mr. Szymanski's instructions. (CX 40) Complainant noticed Mr. Cappelli asking questions, so she asked Mr. Albro whether or not she was under investigation, to which he stated that he did not know. (CX 103, 3/6/97) This contradicts Mr. Albro prior instruction to Mr. Cappelli to report on Complainant for investigatory purposes.

[18] Complainant testified: "It is my understanding as a supervisor who before the reorganization had dealt with other employees at — which I was involved in disciplinary actions against other employees. I was notified by Miss Marcaccio that the disciplinary path was a counseling session and then an oral reprimand, which would come to you in writing. And then a written reprimand, suspension and then I believe it was termination. And I also was aware of the fact as the lowest--as the level of disciplinary action given to Mr. Nero in the T.D. Mack case was an oral reprimand. And I had never received one." (TR 347)

On March 14, 1997, after receiving her written reprimand, Complainant filed a supplemental claim to the EEO/Human Rights Commission, adding Cappelli as a named party. (CX 49) Complainant alleged that the recent complaints were in retaliation for the jurisdictional concerns she had raised on several occasions regarding enforcement action.

Complainant also noted that prior to the reorganization, she had never been subject to discipline. Further, she said that she had never been formally chastised regarding the representations she made to the EPA. (TR 114) She noted that the reprimand was based on the financial disclosures, which were no different than the disclosures she had made in the past and for which she was never reprimanded for in any way. (TR 115) The reprimand, however, is more about her encounter with Mr. LaForge, rather than the substantive issue concerning the carry-over funds. (EX 40)

Conflicts after the Written Reprimand

Complainant testified that following her written reprimand, she continued to be subject to harassment in retaliation for her criticism of RIDEM's enforcement policies. Complainant also testified that her supervisors were trying "to undercut [her] with [her] own staff." (TR 144) She testified that Mr. Mulhare encouraged her staff to bypass her, and that she was left out of meetings with her supervisors, the EPA, and national organizations. (TR 145) Complainant also testified that she was denied training for almost every request she made, and that she also testified that she was being treated differently than other employees in regard to flex time. (TR 146-47) Ms. Marcaccio, however, testified that Complainant's flex time request was denied because her submission did not include a schedule of when she was planning to work, therefore there was uncertainty as to whether she was going to be available during 'core hours.' (TR 2318)

Complainant also noted that she still tried to perform her duties, even though her supervisors were providing unclear and contradictory orders. (CX 103, 3/3/97; TR 5134) Complainant acknowledged that her numerous memoranda critical of her supervisors' actions and policies were frustrating to them. In fact, Mr. Mulhare noted at the April 22, 1997 meeting with the legal staff, Ms. Marcaccio and Mr. Albro, that "problems arose when significant questions of operations came up and confrontations commenced." (CX 50) Complainant also cited to three instances of retaliation: (1) Mr. Albro and Mr. Mulhare would change rules, provide vague instructions and expectations, and excluded Complainant from meetings where decisions concerning her responsibilities were being held;[19] (2) Complainant was subject to a level of review

[19] In fact, John Langlois, legal counsel, on April 2, 1997, commented that it was clear that Complainant was being left out of cases were her expertise was needed. (CX 103, 4/2/97) Further, Complainant wrote to Mr. Albro: "It is clear to me that I am not being included in the discussion/resolution of these issues because I continue to express my concerns about consistency issues within the programs I manage. . . . I believe that I have consistently tried to improve this section, and have consistently tried to help both you and Mike understand and comply with the (continued...)

and control that was clearly different from any other OCI supervisor;[20] and (3) Complainant was restricted from attending professional meetings and training sessions.[21] RIDEM, however, submits that most of her requests were granted, and that those that were not were due to legitimate, budgetary reasons.

1997 EPA Mid-Year Review

In addition to the internal conflicts concerning Complainant, further issues and pressures were also being exerted on RIDEM by the EPA. By the summer of 1997, Mr. Albro and Mr. Mulhare testified that they suspected that Complainant was communicating her disagreement with their enforcement actions with outside officials at the EPA. Mr. Szymanski also acknowledged that the EPA was stepping up its criticism of RIDEM's RCRA enforcement program, and that Albro and Mulhare had developed a significant mistrust of Complainant with respect to her communications with EPA. (TR 3093)[22]

On August 12, 1997, the EPA issued a 1997 Mid-Year Review, reinforcing Complainant's complaints, noting that no Notice of Violation with penalties had been issued since the reorganization. The EPA concluded that RIDEM's RCRA activities "raise questions of whether RIDEM enforcement response policies and guidance are properly being applied." (CX 92) The report also discussed several cases as an example of inappropriate enforcement. This report only increased the mistrust, and on August 26, 1997, Mr. Albro sought, and received, Mr. Szymanski's approval to remind EPA management that Albro and Mulhare, not Complainant, were the

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(...continued)
requirements of the federal program, however every attempt I make is impeded. . . . If I am consistently denied access to information, excluded from meetings and micro managed to an extent that no other manger is subjected to, I believe that it is unfair of you to expect that I can effectively do the job you have asked me to do." (CX 18) On August 19, Mr. Albro responded, refuting Complainant's claim and stating that she was only excluded from meetings in which she was not needed. (CX 18)

[20] In fact, Complainant spoke with Martha Mulcahey, Complainant's counterpart in the air enforcement program, and learned that she was the only supervisor under Mr. Mulhare who was receiving task assignments on a regular basis and performance reviews. (CX 103, 3/24/97)

[21] For example, during February 1997, Mr. Albro refused to allow Complainant to attend an ASTWMO mid-year meeting, despite the fact that Complainant had been appointed to represent the state on a national Hazardous Waste Task Force. (EX 51)

[22] In fact, on August 7, 1997, Complainant wrote to Mr. Albro, "I believe that EPA will echo many of the comments and concerns that I have made on specific cases in their upcoming review of the RCRA program (as it has been managed since the reorganization.)" (CX 18)

appropriate contacts at OCI for the federal RCRA oversight team, in order to stem the flow of information between Complainant and EPA. (TR 3091-92)

Subsequently, in November of 1997, federal auditors were assigned to perform a review of RIDEM's RCRA program, and Complainant had conversations with the EPA staff concerning the effectiveness of the program. (TR 183) Specifically, she noted the that EPA was concerned with the fact that since the reorganization there had been no formal enforcement actions taken from the office on a Notice of Violation type and basis. (TR 184) Complainant considered that fact "to be a poor reflection on our program, but more importantly I felt it was a serious compromise of the whole state program and our commitment to managing hazardous waste." (TR 185) She brought those concerns to the EPA and her supervisors. (TR 185) When the new director came in, Complainant told him that she felt the integrity of the federal program was being "degraded," and she attributed these problems to the supervisors and policies that were in effect. (TR 186) Complainant testified that her supervisors gave her negative responses for her contract with the EPA, and told her that she should not talk to the EPA. (TR 189)

"Non-Performance" Memos

Around this time, Mr. Mulhare and Mr. Albro testified that they were growing increasingly concerned about Complainant's work. Specifically, they noted that several of her cases were taking too long. (TR 3694) Mr. Mulhare testified that the prior to the reorganization the UST and solid waste programs were deficient, and that he later tried to correct problems, but was met with resistance from Complainant. (TR 3504-05)[23] Further, he stated that Complainant's numerous, critical memoranda, contained an "erroneous statements," and prevent RIDEM from getting "projects out the door." (TR 3840) Mr. Albro and Mr. Mulhare testified that they prepared a memorandum on these issues for Mr. Fester and Mr. Szymanski to determine what work was not being completed, and that the intent of the memorandum was in no way connected with any proposed disciplinary action. (TR 4802-08; 3695; 3723) On August 29, 1997, however, Mr. Fester, Mr. Szymanski, Mr. Albro and Mr. Mulhare met to discuss taking disciplinary action against Complainant, and drafted a "non-performance" memo. (TR 4264, CX 84; CX 42) This memorandum was unsigned and undated, and purported to address Complainant's alleged performance failures on several RCRA and UST enforcement cases: Dupane Oil, DiCenzo, Peterbilt, Chase Paint, Xylem Finishing, Western Oil and Klitzner. It is not necessary to relate the specific facts of each case, but generally, the memorandum expressed concerns about delays in drafting amended NOVs. I do note, however, that these were many of the same cases about which Complainant had raised concerns both within RIDEM and to the EPA.

Subsequently, on September 9, 1997, Mr. Szymanski, Mr. Mulhare and Mr. Albro reconvened with Ms. Marcaccio. (CX 76) At this meeting a revised "non-performance" memo

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[23] Mr. Mulhare testified that his procedures were the same as those outlined by the EPA. (TR 3650; CX 79)

was drafted, with some changes. (CX 41) At the meeting the strengths of the various criticisms were discussed, but no exact plan as to discipline was made. Subsequently, Mr. Szymanski noted that some of the cases cited were "too old," and others involved legitimate concerns by Complainant, and therefore, he decided that at that time "it was not in the Department's best interest to go forward with what they were representing." (TR 1683) RIDEM asserts that there was no conspiracy to "get" Complainant in drafting the two memoranda. Further, RIDEM alleges that the documents have little significance because they were never used as a basis for discipline or adverse action against Complainant. (TR 4275-77)

Mr. Mulhare and Mr. Albro testified that they became increasingly frustrated that no action was being taken against Complainant. (TR 2720; 4323) In fact, on October 23, 1997, they met with Mr. Szymanski and Fred Vincent, the Associate Director for Administration at RIDEM in charge of overseeing the Human Resources office. (CX 85) At this meeting, Mr. Albro expressed his concerns and showed them memos written by Complainant. He stated that "the continuing memos and charges of harassment, retaliation and discrimination are becoming increasingly time consuming." (CX 85)

Complainant testified concerning her opinions as to the two non-performance memoranda. She testified that they reflected an elaborate attempt by Mr. Mulhare and Mr. Albro to distort, and take out of context, Complainant's actions on the very cases where she was criticizing their decision, with the goal of turning Complainant's criticisms of them against her. (TR 5171-72) Thus, Complainant noted that the actual reason for the delays in the cited cases resulted from the procedures and policy actions taken by her supervisors regarding re-inspections, and continual changes to and iterations of the drafts. Complainant also stressed that her supervisors never once sat down with her in a constructive manner to discuss her performance on any of the cited cases. (TR 5170)

T.D. Mack Case

The next major issue in this matter concerns an enforcement action against T.D. Mack. Complainant testified that T.D. Mack was a chemical warehouse inspected by RCRA inspectors and the emergency response team, in February of 1997. At the site, the investigators found thousands of barrels of material, with a range of concerns, including whether the materials were waste or product. (TR 1319*;* EX 63) The EPA did not take any action on this case, and Complainant and Robert Nero were instructed to draft a Notice of Violation (NOV) with penalties. (TR 5207*)* Complainant and her staff drafted an NOV, and sent it to Mr. Mulhare. This draft was then passed around between April and August, 1997. (TR 4338)[24] Complainant prepared the NOV with the several alterations, and left it for Mr. Mulhare for his review around

[24] Mr. Nero testified that Complainant and he were challenged more heavily by Mr. Mulhare, and that those actions slowed things down. (TR 1065)

September 13, 1997. (TR 206) The NOV signed by Mr. Mulhare approved a penalty of $68,000.00. (EX 18; TR 4342)[25]

Thereafter, Complainant went on stress leave from September 14, 1997 to October 13, 1997. Complainant alleges that while she was away on stress leave, her supervisors and RIDEM employees, continued to bad-mouth her and denigrate her professional reputation both inside and outside the Department. For example, Complainant has submitted an October 13, 1997 letter to then acting Chief Legal Counsel Claude Cote, wherein Tom Callanan, a hi-tech consultant who had worked with Complainant and others in the Department on a database management project, wrote: "For the record, I have extremely high regard for Beverly Migliore. We have all personally witnessed what I would consider shameful--and extremely unprofessional--treatment of Bev by various entities within the Department. It is truly sad that someone with such great idea, commitment and energy, would be met with such resistance." (CX 22)

When she returned to work, a T.D. Mack draft NOV was on her desk and the penalty had been, in Complainant's words, "significantly inflated" to $100,000.00. Complainant testified that she "didn't understand why they had held up that documents since Mike Mulhare and Bob Nero had been working on the completion of it." (TR 206-07) Complainant testified that she had serious reservations about the newly proposed penalty because she did not believe that the violation found at the site supported such a high penalty. Further, Complainant argued that the higher penalty may have been influenced by external pressure from the EPA.[26] Complainant raised this concern with her supervisors, leaving a note for Mr. Albro. (CX 24, 4/9/98; EX 16) On October 27, 1997, Complainant sent Mr. Albro a memo restating her position that the penalty was too high. (EX 16)

In response, Mr. Albro stated that he was "stunned," since Complainant, after constantly complaining about weak enforcement, was now complaining about strong enforcement. (TR 4671)[27] Upon receipt of Complainant's October 27, 1997 memo, Mr. Albro composed a memorandum to Complainant assigning her 14 different UST enforcement cases. (EX 87; CX 21) Complainant testified that this assignment was an unrealistic request.[28]

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[25] He later commented that he still had problems with it, but he never raised these to Complainant. (TR 4243-44)

[26] As noted, in the 1997 Mid-Year Review, the EPA noted that not one NOV had been issued since the reorganization. (CX 92)

[27]Complainant, however, emphasized that her criticisms and disclosures, since the reorganization, had always been aimed at maintaining the program's consistency with rules and practice. (CX 18)

[28] On November 10, 1997, Complainant wrote to Mr. Albro detailing "serious concerns about (continued...)

Mr. Albro also composed a November 10, 1997 memorandum denying Complainant's charges and describing her statements as "incorrect, misleading, . . . inappropriate" and "outrageous." (CX 21) Finally, he noted that her suggestions that his actions denying her involvement with the RCRA has adversely affected the program "is libelous in nature and I strongly caution you that you go too far in your comments" and he warned "such statements are not only inappropriate but have legal implications." (CX 21)

On November 20, 1997, Mr. Albro wrote to Complainant in regard to her concerns with the T.D. Mack drafted NOV. (EX 17) He requested that she provide the details on which she based her opinion. (EX 17) On November 25, 1997, Complainant submitted her response, in which she noted the difficulty of answering Mr. Albro's request in such a short period of time, and in light of her increased work load. (EX 18) Further, Complainant provided Mr. Albro a copy of her original, final draft "[i]n lieu of proceeding with a specific comment on each element." (EX 18) She stated, "I believe that draft contained the appropriate grouping and assessment for the violations observed during the inspections." She then broke down the six areas of violations for which penalties were addressed. Complainant also based her opinion on, and provided Mr. Albro with supporting documentary evidence of, prior and similar RCRA NOVs, which indicated the newly increased penalty was outside the reasonable range of prior enforcement actions. Finally, she stated, "I realize that here was a great amount of time expended by staff on this case, however, we cannot recover those costs by artificially inflating the penalty." (EX 18)

Upon receipt, Mr. Albro sent a memo to Ms. Marcaccio, Mr. Fester, Mr. Szymanski and Mr. Mulhare requesting disciplinary action on grounds of insubordination, and stating that she had delayed the enforcement action. No action was taken, and on December 5, Mr. Albro again instructed Complainant to provide a detailed fact assessment justifying her opinion. (EX 19) On December 12, 1997, Complainant again responded, providing a more detailed account, but also

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(...continued)
the manner in which your order was conferred upon me, the conflicting messages that result as a consequence of my expressed concerns about this project, my ability to carry out this directive (based both on my current workload and your repeated refusal to train me in this area) and the relegation of this type of work to a program manager when other, trained staff, is available for this task. I suspect your motive for assigning me *two full time jobs* . . . has more to do with your current trend of denigrating me." (CX 20) (emphasis in original). Further, she wrote: "I have discussed with you many times the importance of maintaining a current, consistent enforcement program in order to maintain our RCRA obligations . . . I know that your continued actions to deny my involvement in this area which I am best suited for has adversely affected the state program. While so many of the conflicts that are so apparent in this office appear to be only related to the unbridled POWER concerns of the management, my concern remains with the RESOURCE." Complainant also alluded to the stress caused to her and her family. (CX 20) Complainant showed this memo to Ms. Marcaccio and complained of the legal threats contained therein. Ms. Marcaccio, however, thought Albro's threats were appropriate because she saw it as a big problem that Complainant had accused a division chief of mismanaging a state program. (TR 2448)

questioned why she was being singled out when Mr. Mulhare had signed off on the NOV. (EX 20)

During the pendency of the T.D. Mack discussions, Complainant stated that she felt Mr. Mulhare "was asking other people to write memos that would be denigratory towards me" and that "they were trying to build some record against" her. (TR 253) Complainant stated that she wrote memos to both Mr. Albro and Mr. Mulhare stating that she felt that she was being treated differently. (TR 253) On November 20, 1997, Mr. Albro sent the draft of the NOV to Sam Silverman, the enforcement chief at EPA, requesting that he assess whether or not the penalty was appropriate. (CX 86)[29] Mr. Albro also drafted a memo to Complainant requesting that she provide details for her opinion. (EX 17)[30]

Mr. Albro also stated that he was "confused" by Complainant's December 12, 1997 memo and had several people review it, including Mr. Mulhare. Upon review, Mr. Mulhare noted the discrepancy between the facts in paragraph 8 and the new facts in the emergency response file Mr. Leo had shown him, Mr. Albro then raised this issue to his superiors. (CX 23; CX 54) Eventually, it became clear that Complainant's response was made without reference to certain facts. In short, Respondent alleges that Complainant never compared the NOV with Mr. Nero's report for accuracy.

A January 12, 1997 meeting was held with Mr. Albro, Mr. Mulhare, Mr. Nero, Mr. Leo and Complainant, to review the case. At this time, Complainant became aware of documents that she did not review in drafting her NOV. (TR 229-30) Complainant then accused others of withholding information.[31] Complainant, however, stated that the new information had no impact on what she felt was the appropriate penalty. (TR 234)[32] Complainant testified that Mr. Albro,

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[29] Mr. Silverman's notes stated that Mr. Albro's primary motive was to use the penalty issue "in disciplinary action w/ B. Migliore." (CX 90)

[30] Specifically, he wrote: "[P]lease provide to me in writing your detailed position on each fact, violation and assessed penalty set forth in the current draft NOV. Please let me know whether you agree or disagree, and, for each issue you disagree with, please provide me a detailed response in writing of your basis for disagreement with a recommendation for those changes you believe are appropriate." (EX 17)

[31] The Emergency Response branch was working on the investigation and reporting directly to Mr. Mulhare. Mr. Mulhare, however, did not inform her or Mr. Nero that they were working on it. (TR 231) Complainant testified that she did not have an opportunity to examine that file until January of 1998. (TR 232)

[32]Complainant explained that the specific conflicts, concerning the separating or lumping together of improper characterization and improperly labeling violations for "unidentified" drums, (continued...)

however, thought that Complainant did not accurately review the data available. (TR 210) Respondent, on the other hand, stated that Complainant's drafted NOV failed to compare the factual allegations to the investigators' report and that this inconsistency on the face of the NOV prevented its finalization for months, and required Mr. Albro to initiate multiple meetings with staff, which seriously delayed and compromised the enforcement action.

One Day Suspension

Following that meeting, Mr. Albro reported to Mr. Szymanski that the meeting confirmed the fact that certain facts were at odds with the staff reports. (CX 23) On February 10, 1998, Mr. Albro sent Mr. Szymanski a formal request of discipline against Complainant, alleging that she had been insubordinate since her November 25, 1997 response, and had created delays. (CX 23) Specifically, Mr. Albro alleged that Complainant did not adequately respond to his two memoranda, and that her complaints, coupled with a lack of explanation, unduly delayed the enforcement of the T.D. Mack case.

Concurrently, on February 26, 1998, Complainant forwarded several memos to both Mr. Szymanski and Ms. Marcaccio, with a letter alleging that Mr. Albro's "refusal to address my requests/concerns demonstrates his unwillingness to interact with [her]. This behavior impedes [her] in carrying out [her] responsibilities. It is my opinion that this matter of treatment is not only highly unprofessional but also retaliatory in nature." (CX 51)

On March 2, 1998, Mr. Szymanski issued Complainant a notice of a proposed one-day suspension. This was based on the allegations provided in Mr. Albro's February 10, 1998 request for discipline, allegations of Complainant's insubordination, inclusion of incorrect facts in the draft NOV, and unnecessarily delaying the enforcement action against T.D. Mack. (CX 25) Interestingly, this notice was issued one day before the reprimand would be removed from her file. The following day, on March 3, 1998, Mr. Bob Nero was given an oral reprimand by Mr. Albro for his role in inserting "inaccurate facts" in the draft NOV. (CX 26)

According to RIDEM procedure, a hearing was scheduled on April 3, 1998. Mr. Szymanski appointed himself to sit as the independent and impartial hearing officer, responsible for rendering a final decision. (TR 2094)[33] Complainant was represented by Fidelma Fitzpatrick. On April 10, 1998, Mr. Szymanski issued a final decision imposing a one-day suspension against Complainant. (CX 27) The decision was issued one day after Complainant filed her lengthy

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(...continued)
would not have affected her final penalty opinion.

[33] Complainant also questioned Mr. Szymanski's biases, and submits a memorandum, from April 10, 1998, where Mr. Albro forwarded a memo from Complainant to Mr. Szymanski with a note that read, "Ed, here is the latest from our 'RCRA expert,'" a note which reeks with sarcasm, in this Court's judgment. (CX 28)

defense,[34] and did not address the arguments raised in Complainant's brief. Further, the written explanation is almost identical to the March 2, 1998 Notice of Proposed Suspension, and the February 10, 1998 request for discipline. (CX 235; CX 24; CX 25)

Mr. Szymanski testified concerning the TD Mack case and the alleged non-responsive memoranda forwarded by Complainant. When asked whether Complainant's act of providing other cases as an example of a more appropriate fine was in fact similar, and in line with, the consistency policy sought after the reorganization, he answered that RIDEM sought consistency with current actions, not the old cases. (TR 1560) Mr. Szymanski also stated: "I took disciplinary action against Mrs. Migliore because she didn't answer Dean Albro's questions." (TR 1568) But he later noted that on December 12, 1997, Complainant did respond to Mr. Albro, but that there were still questions. (TR 2118)

Complainant served her one day suspension on April 13, 1998. She also noted that other disciplinary actions at this time were scarce.[35] Notably, despite alleging that Complainant "unnecessarily delayed" the T.D. Mack case, the actual NOV was not issued until May 12, 1998 (EX 15).

As of Complainant's May 8, 1998 complaint, she was represented, in part, by attorneys at Public Employees for Environmental Responsibility (PEER), and filed her initial complaint with the United States Department of Labor. (ALJ EX 2)

EPA OIG Audit

On May 27, 1998, PEER filed an "overfile" petition with the EPA regarding RIDEM's handling of the Klitzner case. Specifically, PEER argued that RIDEM's issuance of a warning letter was grossly inadequate, in light of the fact that Klitzner was a repeat violator. PEER requested federal enforcement of the case. (CX 109)

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[34] At the hearing Ms. Fitzpatrick raised a number of defenses, alleging that Complaint was not provided sufficient notice of the charges, and also requested an opportunity to cross-examine witnesses. (CX 24) This was denied, and Ms. Fitzpatrick refused to go forward under such conditions. (TR 2095-96) Instead, Ms. Fitzpatrick filed a length written defense late in the afternoon on April 9, 1998. (CX 24; TR 2099) The decision was issued early the next morning.

[35] Ms. Marcaccio, the Human Resources Chief, testified that the RIDEM had taken formal disciplinary action on 'well over' 200 occasions during her 5 years with RIDEM, at an average of about 5-15 in a given year. (TR 2290, 2410) However, the Department's Affirmative Action Plan for 1997-1998, prepared by her own office, indicates that from mid-1997 through mid-1998, RIDEM took disciplinary action against full-time employees on only three occasions. (CX 53) The only suspension for that entire period was Complainant's, and the only oral reprimand for that period was Nero's. (TR 2411-12)

As noted, the EPA had been critical of RIDEM's handling of the case back in 1997, and upon receipt of the PEER petition, they initiated a file review and directed inquiries to OCI officials. This made Mr. Mulhare very defensive, and he also assumed that the information contained in the PEER petition was provided by Complainant. (TR 4562)[36] Further, Complainant testified that both Mr. Albro and Mr. Mulhare voiced their opinions that they were not really concerned with the EPA, and that Mr. Albro "made comments at several of the staff meetings that EPA didn't run the program, that we ran the program." (TR 276) Complainant testified that this concerned her since part of her job responsibility was to "maintain the credibility and the authority that was vested in us by the [EPA] for the Federal program." (TR 277)

In early April of 1998, RIDEM became aware that the Inspector General's Office of the EPA (IG) was coming to audit the RIDEM RCRA program, and in an April 10, 1998 memorandum to Mr. Albro, she indicated that her staff was preparing the information for which the IG's Office was looking. (TR 256; CX 28) Apparently, Mr. Albro then requested a memo asking what the IG would be doing, and also about the enforcement policy of the State. Complainant testified that she responded, and noted "that since they had not continued to include me in the policy formulation for that, that I didn't think that I could answer a question related to our State enforcement policy." (TR 257) Mr. Albro then wrote comments on the letter which was forwarded to Mr. Szymanski, "This is probably a good indication of the type of cooperation we can expect from Mrs. Migliore during this audit," which Complainant felt was "totally inappropriate." (TR 257-58)

In the Spring of 1998, the IG began an audit of the RIDEM RCRA enforcement program for the fiscal years 1996 and 1997. EPA officials met with several individuals and reviewed several case files. Complainant told the auditors that her supervisors had consistently ignored her judgments and recommendations. (TR 5231) Complainant testified that she raised those same concerns to Mr. Albro and Mr. Mulhare, prior to the EPA investigation. (TR 265)[37]

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[36] Mr. Mulhare placed the blame on Ms. Joan Talyor, an inspector on Complainant's staff. Ms. Taylor, along with Complainant, had actually disagreed with Mr. Mulhare's penalty decision. Nevertheless, Mr. Mulhare suggested to the EPA that she had gone back to the file after it was closed and intentionally altered documents to undermine RIDEM's position. (TR 1221,4563) In fact, Ms. Taylor had returned to the file to complete a clean checklist as a result of Mr. Albro's criticism that she had made notations in the margins of the inspection documents. (TR 1221) Ms. Taylor denied any wrongdoing.

[37] Complainant testified that she "regularly questions them" and told them that her "statements were not opinions," but "based on Federal requirements." (TR 265)

The IG's draft report was issued on June 22, 1998,[38] and Mr. Albro then requested that Complainant review the report, and provide a response to him. (CX 29) Further, he reminded her that the draft was not for distribution outside of RIDEM.

On July 3, 1998, Complainant submitted her response and told Mr. Albro of the several cases in which she raised concerns. Complainant described the draft as a summary of recent cases under the RCRA, and it provided short narratives on areas for improvement. (TR 263) The report also provides a case-by-case discussion of what was deficient. (TR 263) As for the RCRA, the report had problems with timeliness and appropriateness of actions, and also noted the following problems: lack of written guidance for consistent identification of violation; management's inability to resolve staff disagreements over the program direction and administration; an emphasis on completing inspection at the expense of case follow-up; lack of a formal tracking system for follow-up and pending enforcement actions; the management's lack of confidence in staff; and the general unproductive use of staff resources, such as repeated inspections of same facilities and "RIDEM's perception that Rhode Island's legislature doesn't want a strong and aggressive environmental enforcement presence." (TR 264-65)

Complainant testified that her concerns were not considered in the ultimate enforcement action chosen. Further, she never received any response from Mr. Albro on these comments. (TR 273) Finally, with reference to RIDEM's July 21, 1998 response to the EPA, Complainant alleges that RIDEM blamed her for almost every problem. (CX 91)[39]

Facts Related to Complainant's Second Claim

On September 9, 1998, Complainant filed a second complaint alleging continued intimidation, coercion and threats. (ALJ EX 41) Complainant testified that after filing her initial complaint that she was further excluded from activities, and that her responsibilities and staff were reduced. (TR 282) Specifically, Complainant highlights a July 16, 1998 memorandum from Mr. Albro, a denial of request for leave, and two memoranda from Director McLeod. An understanding of these events, however, requires an initial discussion of the history of the American Shipyard enforcement action.

American Shipyard Case

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[38]Mr. Szymanski stated that since many of the complaints were the same ones that Complainant had raised, he assumed that she was giving her opinions to auditors. (TR 1702, 1716-18) This, he said, was when he began to distrust Complaint.

[39] Despite Mr. Szymanski's statement that they would not "specifically try to lay any blame on Ms. Migliore in our response to the Inspector General." (TR 1748)

The American Shipyard case has a long and detailed history, which shall only be briefly summarized here. Suffice to say, this case was the source of a great deal of stress for both Complainant and RIDEM, as well as public embarrassment for RIDEM.

On October 3, 1996, a RIDEM air enforcement inspector responded to a complaint concerned sandblast grit (a.k.a. "black beauty") at the American Shipyard facility on the harbor in Newport, Rhode Island. (RX 43) At that time the air inspector observed the possible improper handing and storage of hazardous materials at the site. (RX 43) This inspector then took several photographs of suspect drum barrels and forwarded the pictures and the complaint report to Bob Nero, on Complainant's staff. (TR 1162) Mr. Nero did not advise Complainant of this information, and, in fact, she did not see the air inspector's notes or photographs until this proceeding. (TR 1162-63, 5221)

An inspection of the site did not occur until May 20, 1997, when Robert Nero and Joan Taylor observed "literally hundreds of containers of waste paints and paint-related wastes being stored without secondary containment," many of which were rusted, or insufficiently labeled. (EX 25) The inspector returned on September 10, 1997, to complete their earlier inspection, noting again potential violations. (EX 84)[40] Ms. Taylor also noted that at this time American Shipyard had filed for bankruptcy, and was involved in a bailout by the Rhode Island Economic Development Corporation. (EX 25)

Complainant and her staff determined that an administrative penalty was warranted. They drafted an NOV and forwarded it to Mr. Mulhare. (TR 294; EX 113) For the next several months, Mr. Mulhare took no action on the NOV, other than requesting more information or changes. Complainant testified that she repeatedly raised concerns over Mr. Mulhare's delay. Then, on March 17, 1998, Mr. Mulhare announced that he wanted another inspection of the facility. Complainant strongly objected, as she felt there was sufficient information to go forward with the NOV, and that any further reinspection would unnecessarily delay the enforcement action. (TR 5224)

Nevertheless, on March 23, 1998, John Leo, of the emergency response unit, inspected the American Shipyard site and videotaped the problematic site. Mr. Leo observed several compromised containers, which had worsened since the last inspection. Further, he noted some containers were "leaking," in "advance state of decay," and with "spillage" problems. (CX 32) He also noted that this served a strong threat to both the environment and public health, as the shipyard was located on the harbor in Newport. (TR 1341) Mr. Leo testified that he showed Mr. Mulhare the video that same day. (TR 1342-44)

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[40]At this time, Ms. Taylor noted: "[S]ome effort had been made to consolidate the wastes/materials previously observed on 5/20/97. Containers appeared to have been organized to some degree and were fewer in number. Essentially the same violations exist (no labels, no secondary containment, lack of aisle space, storage of ignitables within 50ft. of the property line, etc.)." (EX 84)

Complainant Goes to PEER and the EPA

Following this third inspection, no action was taken on the case. Complainant continued to raise questions about the status of the NOV. (CX 32; CX 78) This lack of action discouraged and upset Complainant, and she testified that she felt that the environmental and public health threat was strong. Further, she felt that Mr. Mulhare and RIDEM were violating the RCRA's requirements for timely and appropriate enforcement. Accordingly, Complainant testified that she took her information to Mr. Piligian at the EPA, as well as Attorney Robins at PEER and the media, in order to instigate action and highlight RIDEM's violation of the RCRA. (TR 329) Complainant also informed Mr. Mulhare that she had shared this information with her attorney. (TR 329) Subsequently, on October 7 and 8, 1998, stories concerning American Shipyard appeared in both the **Newport Daily News**, and the **Providence Journal**, respectively. (CX 32) In both stories, PEER representatives are quoted as stating that containers of hazardous waste at the shipyard had leaked. (CX 32) This press disclosure raised concerns both inside and outside of RIDEM.

RIDEM presented evidence of their immediate concern over the safety of the site and environment. Mr. Szymanski testified that his foremost concern was whether or not there were leaking barrels at the American Shipyard site. He noted that both press articles cited to leakage, while his understanding was that there was no leakage. Accordingly, on October 9, 1998, Mr. Szymanski wrote to Complainant requesting that she "review the file on this case immediately and provide . . . a determination based on the evidence in the file as to whether there were barrels leaking at this facility." (CX 32) He requested a response by the close of business that day. (CX 32) Mr. Szymanski testified that his verbal order was that Complainant not consult with anyone else, however, his written instructions were not as adamant. (TR 1783)

Complainant, however, testified that she informed Mr. Symanski that she would need to talk to the inspectors, since she had not been to the facility during the inspection period. (TR 323) Complainant then asked the investigators, Ms. Taylor, Mr. Nero and Mr. Leo, to draft brief memoranda on what they observed. In addition, Complainant reviewed the photographs and videotape footage that Mr. Leo had taken in March, data which she concluded showed evidence of leakage. (TR 326; CX 32)[41] Later that day, Complainant presented her findings, and the memos to Mr. Szymanski. (CX 32) Complainant concluded: "A review of the above noted sources, as well as a review of the photos in the file, . . . and the videotape which was taken on the 3/23/98 inspection revealed several areas where it appears that leaks were evident." (CX 32) She also noted photographic evidence of stains from earlier releases. Complainant also attached the memoranda of Mr. Leo, Mr. Nero and Ms. Taylor. The three memoranda described the poor

[41] I pause to note, this is the same video evidence that was observed by Mr. Mulhare back in March, 1998.

conditions of barrels, yet neither Ms. Taylor nor Mr. Nero noted leakage. (CX 32)[42] Mr. Leo's memorandum, however, indicated "both leaking five (5) gallon and fifty-five (55) gallon drums." (CX 32) Further, Mr. Leo concluded: "I can definitely state that on the inspection 3-23-98 there were drums in poor shape and some of these had leaked hazardous waste onto the ground at American Shipyard." (CX 32)

At the hearing, all three inspectors testified about their findings and opinions. Ms. Joan Taylor also testified that she did not see signs of staining on the ground or pavement, (TR 1201) and after viewing the video, she noticed what looked like paint dripping down the side of the drum. (TR 1212) She stated that the site, however, did not have leakage or spillage. (TR 1236-37) Mr. Nero also testified on his findings that the containers "could lead to leakage." (TR 1118) At the hearing, Mr. Leo testified about the American Shipyard case, noting that he "saw signs of spillage and leakage," discoloration on asphalt, and unlabeled containers (TR 1338-39) He said that the site, however, was not an immediate hazard. (TR 1341) He also told Mr. Albro that he wrote a memo on this for Complainant, but he stated that he did not know how the information was obtained by the **Providence Journal**. (TR 1350-52)

Following the press release, a spokesperson for Governor Almond told reporters there was no evidence of leaking drums in the American Shipyard file. In response, PEER disclosed Complainant's October 9, 1997 memorandum to Mr. Szymanski. (CX 118) This prompted Director McLeod to open the entire file to reporters and vowed to 'get to the bottom' of the Shipyard debacle.

That same week, Mr. Albro called a meeting with Complainant, Taylor and Nero, where he ordered the inspectors to 'qualify' their reports. (EX 41) Complaint described Mr. Albro as "loud" and "angry" at this meeting. (EX 41) Two days later, PEER filed a criminal complaint against Albro, alleging that he had ordered staff to change state documents to cover-up references to leaking drums. (EX 42) This allegation was made despite the universal testimony that Mr. Albro only asked the inspectors to "qualify" their comments in that memo, and had never instructed them to change their findings. (TR 1120-21)

Director McLeod then appointed a panel of independent investigators to assess the case, and on October 23, 1998, RIDEM issued the American Shipyard NOV. (EX 31) Soon after, McLeod resigned.[43]

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[42]Mr. Nero's memorandum noted that the conditions "could lead to leakage or damage." (CX 32)

[43] Briefly, Complainant notes, that despite Mr. Mulhare and Szymanski's attempts during the period to discipline her, that no action was ever taken or contemplated against Mr. Mulhare. (TR 3209-10) Mr. Szymanski now says that if Mulhare really had known about the video showing leaking drums and really had failed to bring that information to his superiors' attention during the (continued...)

Complainant also testified that around this time a mailing went out to all employees based on the PEER notification. That mailing did not reference her by name, but mentioned a supervising environmental scientist within the office, and it indicated that she was not telling the truth. (TR 342) This memorandum was posted so that other RIDEM employees could see it, and each employee also received a copy in their employee mailboxes. (TR 342)

PEER Petition and McLeod Memos

Concurrent to these events, Complainant cites to two memoranda from Director McLeod, regarding a PEER petition, which she alleges reflect continued discrimination.

On August 6, 1998, PEER filed a "Petition for Corrective Action, An Order Commencing Withdrawal Proceedings, And Other Interim Relief With Respect to Rhode Island's Hazardous Waste Regulatory Program," with the EPA Regional Administrator in Boston, John deVillars. (CX 48) The PEER filing did quote from a "DEM RCRA enforcement specialist" and alluded to the ongoing investigations by description, but not by name: referring to American Shipyard as "a maritime facility right on the harbor in Newport." The PEER filing was a formal petition seeking the EPA to withdraw RIDEM's authority to enforce RCRA's hazardous waste program in Rhode Island. The objections included allegations that RIDEM was violating the RCRA through untimely, and improper enforcement actions.

While unnamed, Complainant assisted PEER in a petition requesting that the EPA withdraw RIDEM's authorization to enforce the RCRA in Rhode Island. (CX 48) Complainant also stated that she became even more concerned that her supervisors' actions were leading to tangible harm to the environment and public health. (TR 683, 5227) Accordingly, Complainant then provided PEER with her July 3, 1998 comments on the draft IG report, which summarized her position on the management problems. (TR 675) Complainant, however, did not provide the draft report itself, as she had been instructed to keep that report confidential. Complainant also disclosed her knowledge and concerns over the American Shipyard case, and that containers were most likely leaking their hazardous contents. (TR 5228) Despite the fact that the PEER release referred to "leaking" drums, Complainant testified that she "never said that there were any leaking drums of hazardous material." (TR 676) Complainant stated that she felt the American Shipyard site contained eroded and compromised drums, but that "the work leaking may be . . . inappropriate," and a "mischaracterization." (TR 677)

On August 6, 1998, Mr. Szymanski received the PEER withdrawal petition, and he assumed that the information contained therein was obtained from Complainant. (TR 1719,

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(...continued)
crisis that began on October 9, 1998, such conduct would be grounds for discipline.

1801)[44] Around this time, Mr. Szymanski also received Mr. Albro's request to discipline Complainant. Mr. Szymanski met with RIDEM Director Andrew McLeod and Ms. Marcaccio to discuss both the PEER petition and any potential action against Complainant. (TR 1798-1801) It was decided that Director McLeod would write to Complainant to seek an explanation.

On August 18, 1998, Complainant received a memorandum from Director McLeod concerning the release of confidential information in the PEER August 6, 1998 petition. (TR 303; CX 33) Director McLeod expressed his concern about how the release of confidential information concerning pending investigation could jeopardy RIDEM's ability to "enforce and prosecute these important cases."[45] Director McLeod noted the reference by PEER to a "DEM enforcement specialist" who provided a memorandum to PEER. He then instructed Complainant to "provide . . . a written account, within 5 working days, of any and all knowledge you possess as to how PEER obtained this information though your office, any discussion you had with your superiors regarding release of this memorandum, and the release of information on the two pending enforcement cases under the PEER complainant." (CX 33) Finally, Director McLeod noted that the purpose of his request was to "determine consistency with departmental policies and established operating procedures designed to protect the environment, public health, ad the rights of all parties." (CX 33)

Complainant responded on August 25, 1998, stating that she had "been advised by legal counsel that, due to the fact that the issues you have addressed are matters that are the subject of current pending litigation, it is inappropriate for me to respond." (CX 33) Complainant also indicated that her legal counsel would further address his request. (TR 304; CX 33)

Soon thereafter, on August 28, 1998, Complaint received a second memo stating that her response was unacceptable, and that if she did not respond, she would be subject to "corrective action." (CX 33; TR 304)[46] On August 31, 1998, Attorney Robins responded to Attorney Lee

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[44] Complainant testified that, since the reorganization, she is the only OCI employee who has been closely scrutinized. (TR 5145)

[45] I pause to note that, despite Director McLeod's concern over the disclosure of information, only a few weeks later he would make the entire American Shipyard file available to news reporters.

[46] Specifically, Director McLeod wrote: "I direct you, an employee of this agency, to provide me with information relative to the performance of your duties in the Office of Compliance & Inspection. Your letter informing me that it is inappropriate to for you to respond is unacceptable. . . . [Y]ou are hereby again directed to fully and completely provide me with the information requested in my August 18, 1998 memorandum no later than close of business, Monday, August 31, 1998." (CX 33) Finally, Mr. McLeod concluded: "Be advised that your failure to respond as directed is detrimental and injurious to environmental enforcement by DEM. Further, your failure to comply (continued...)

concerning Director McLeod's second memorandum. (CX 95) Further, on September 9, 1998, Complainant filed a second complaint alleging that Director McLeod's memoranda constituted unlawful retaliation.

Blair Discussion and Albro Memo

Concurrent with the American Shipyard issue, a another conflict and issue arose concerning Complainant's contact with the EPA. On July 9, 1998, Melissa Blair, an investigator with EPA Region One, Office of Inspector General, initiated a telephonic meeting between Ms. Blair, Complainant, and Complainant's attorney. (TR 284; CX 30) Ms. Blair indicated that the reason for the meeting was the EPA IG's consideration of initiating a criminal investigation of RIDEM officers regarding the misuse and misappropriation of federal RCRA grant money.

At this meeting, Complainant told Ms. Blair about four instances since 1990 that RIDEM officials sought to use federal RCRA monies or assets for non-federal programs. (TR 284, 312-13) Further, Complainant discussed the issues surrounding the 1996 Financial Status Report. Finally, Complainant said that RIDEM had improperly placed enforcement personnel whose salaries are covered by federal grant monies on a state payroll account to facilitate enforcement staff reductions. On July 15, 1998, PEER filed a formal submission, on Complainant's behalf, to the EPA OIG summarizing her complaints and her July 8, 1998 discussion with Ms. Blair. This filing included supporting documentation. PEER also released the information to the news media.

Mr. Albro learned of the PEER filing, and on July 16, 1998 sent a memorandum to Complainant, demanding that she provide him with a written account of her conversations with Ms. Blair and the OIG's office. (TR 282; CX 30)[47] Complainant, responding that same day, indicated that the July 15, 1998 PEER filing correctly reflects her conversation with Ms. Blair. She also told Mr. Albro that she felt "this scrutiny of my normal job activities to be unwarranted, inconsistent with the treatment of any other staff in the office and further evidence of the harassment I continue to be subject to." (CX 30; TR 286) This response was one of the reasons Mr. Albro sent to Mr. Szymanski a request for discipline of the Complainant. (CX 31) Mr. Szymanski testified that he began to mistrust Complainant when he felt that her representations

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(...continued)
with this directive may result in appropriate corrective action." (CX 33)

[47] Mr. Albro also informed Complaint that she had failed to "sign out" for time spent meeting the Ms. Blair on July 9. (CX 30) He stated that time spent with her attorney is not work-related time and demanded an accounting. (TR 4992) Complainant responded on August 11, 1998, informing Mr. Albro that the meeting was at the IG's request and the discussion was about her work as a RCRA supervisor. She also stated that she felt this scrutiny was another example of continued harassment by her superiors at RIDEM.

showed up in the IG report. (TR 1718-19) He was also growing concerned about the language of her memoranda and the accusations alleged against Mr. Mulhare and Mr. Albro. (TR 1730)

On August 25, 1998, Mr. Albro notified Complainant that her request to take three hours on leave, by averaging hours, was denied. Complainant testified that such requests are common and are routinely granted, but that Mr. Albro said her request was denied because she "owed the director a memo," referring to Director McLeod's August 18, 1998 request for an "accounting." Complainant alleges that this is a further example of her discriminatory treatment.

Facts Relating to Complainant's Third Claim

Complainant's third complaint concerns events occurring in the Fall of 1998. Mr. Albro testified that during this time he could not get the EPA to return his phone calls. (TR 4693-97) He stated that this created an impediment to his work on the programmatic issues. Mr. Albro blamed this situation on Complainant, alleging that she was not relaying information to him, a charge which Complainant denied. (TR 340) Mr. Albro sought to address this situation by asking the EPA to communicate directly to him on programmatic issues, and to not go through the Complainant. (CX 34) Mr. Albro made this request of Mr. Silverman, the Assistant Director of the Office of Environmental Stewardship at EPA's regional office in Boston, Massachusetts.[48] Mr. Silverman complied with Mr. Albro's request, and informed his staff to discuss all programmatic issues involving RIDEM with Mr. Albro directly.

As noted, Complainant's position required frequent contact with the EPA, and she testified that she had a positive relationship with employees of the EPA. (TR 339) She testified that on September 24, 1998 she contacted Mr. Piligian at the EPA through her regular course of business,[49] and he told her that he had been instructed that he could no longer speak with her. (TR 338; CX 34) Complainant testified that Mr. Piligian told her that Mr. Albro had requested that the EPA no longer have contract with her. (TR 338-39) That same day, Complainant wrote to Mr. Albro complaining that his action "completely impeded" her ability to do her work, and also "casts aspersions on [her] credibility and directly impugns [her] performance reputation." (CX 34) Complainant testified that Mr. Albro did not respond to her document, however, Complainant learned that she had been accused of withholding information she gathered from EPA. (TR 340) She also felt that their concern was that she was making disclosures to the EPA, and the also referenced PEER notification. (TR 341)

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[48] Mr. Silverman supervises EPA officials responsible for the federal oversight and monitoring of the RIDEM enforcement under, among other statutes, the RCRA.

[49] Complainant testified that her contact with Mr. Piligian was "made in accordance with [Mr. Albro's] directive to the RCRA staff to complete a status review for all outstanding RCRA cases." (CX 34)

On September 29, 1998, Attorney Robins contacted Mr. Silverman to discuss this issue, and wrote a letter as a representation of that conversation. (CX 34) Attorney Robins alleges that Mr. Silverman told him that Mr. Albro's intent was to have communications from the EPA go through Mr. Mulhare and Mr. Albro. (CX 34) Attorney Robins's understanding was that Mr. Albro's request would not prevent communications initiated by the Complainant. (CX 34)

On October 14, 1998, however, Mr. Silverman wrote to Attorney Robins to clarify his position and correct what he felt were misstatements in Mr. Robins's letter. Mr. Silverman clarified that Mr. Albro was acting in his capacity as Complainant's manager, stating that he could no longer rely upon Complainant to convey the contents of conversations with the EPA. Mr. Silverman agreed to this request, stating that his own concern was not with any internal RIDEM problems, but rather with "the effectiveness of the DEM in implementing a credible hazardous waste enforcement program that protected public health and the environment in Rhode Island." (CX 34) Mr. Silverman also clarified his understanding of whether all contacts were to be severed with Complainant, or whether Complainant-initiated conversations were acceptable. He stated that since their initial conversation, he had spoken to Mr. Szymanski, who clarified that RIDEM's position was that EPA cease all communication with Complainant, even when she initiates the conversation. (CX 34)

Mr. Szymanski, however, denied that he requested that Mr. Silverman cease all communications, rather he stressed that Mr. Albro and Mr. Mulhare should be the main contacts for the EPA. (TR 1820-24) Mr. Szymanski testified that he spoke with Mr. Silverman at EPA based on Mr. Albro's request that Complainant's contact with the EPA should be limited. (TR 1819-20) He testified that he "wanted firsthand information going to Mr. Albro," but stressed that the intent "was not to isolate [Complainant] or to prevent her from communicating with EPA on interpretations of daily regulatory matters." (TR 1824) Rather, Mr. Szymanski stressed that discussions of high priority items to go directly to Mr. Albro. (TR 1824) He also stated that he never told Mr. Silverman that he wanted the EPA to decline conversations with Complainant, if she called them. (TR 2983) Mr. Szymanski also testified that he verbally corrected Mr. Silverman's misunderstanding after he read a copy of Mr. Silverman's letter to Attorney Robins. (TR 1824)

On October 14, 1998, Complainant filed her third complaint, alleging that RIDEM's efforts to "gag" her communications with federal officials constituted unlawful retaliation under the RCRA employee protection provisions. Specifically, Complainant alleges that RIDEM's actions served "to prevent Complainant from making further protected disclosures to federal oversight officials." (ALJ EX 64)

Current Position

On October 15, 1998, Mr. Szymanski transferred Complainant out of OCI, and reassigned her under Ron Gagnon in the Office of Technical and Customer Assistance. Complainant's responsibilities were modified, and her office location was moved out of the RCRA area. (TR

360, 1827; EX 24)[50] Complainant alleges that Mr. Szymanski has continued to isolate Complainant and impede her work by canceling meetings relevant to Complainant's new duties and then purposely rescheduling them without notifying her. (CX 81) Complainant testified that her work load has been severely reduced, and that she is no longer given assignments comparable with her expertise.

In her new position, Complainant's duties still require her to have access for RCRA files, and that this fact led to a confrontation with Mr. Symanski on November 30, 1998. Apparently, Complainant was working on her new assignment, and needed a document from the RCRA area to complete a project. She then went to her old office to look for a document, and she spoke with Ms. Taylor to ask her for some supporting documents. Mr. Albro saw Complainant in the office and called Mr. Szymanski, who requested to see Complainant immediately. She said that Mr. Szymanski informed her that she was not to have any contact with the staff that had formerly worked for her. Complainant testified that she asked why she was being treated this way, and that he responded that she was being treated the way she deserved to be treated. Complainant testified that she asked Mr. Symanski to put his instructions in writing, but he refused. (TR 357)

Mr. Szymanski testified that he instructed Complainant that she could go to the files in the RCRA program area, but only after Mr. Mulhare and/or Mr. Albro was informed in advance. (TR 1828) He did not recall stating that she was being treated the way she deserved, but noted that she was placed with this added instruction because she was giving out confidential information. (TR 3005)

I have extensively summarized the essential aspects of the testimony in order to put into proper perspective Complainant's allegations.

III. ELEVENTH AMENDMENT

At the outset, I must address Respondent's preliminary argument regarding the Eleventh Amendment to the United States Constitution. Respondent has argued that this matter should be dismissed, because the Eleventh Amendment bars this Court from entering an award against Respondent, a state agency. Further, Respondent argues that recent Supreme Court cases reinforce this claim related to state immunity and waiver. (EX 125)[51] In the alternate, Respondents argue that even if the Eleventh Amendment is waived, RIDEM can only be liable under the specific language of the SWDA, which does not include internal complainants in its statutory definition of protected activity.

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[50] Mr. Szymanski testified that Complainant did not volunteer to leave OCI, nevertheless, he permitted RIDEM's public affairs office to issue a statement saying otherwise. (CX 80)

[51] **See Alden v. Maine**, 119 S. Ct. 2240 (1999); **College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.**, 119 S. Ct. 2219 (1999); **Florida Prepaid Postsecondary Educ. Expense Bd.**, 119 S. Ct. 2199 (1999).

Initially, I note that the Solid Waste Disposal Act permits "any person" to commence a civil action under the Act "against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution)." 42 U.S.C. § 6972(a)(1)(A). The Eleventh Amendment to the Constitution provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." **U.S. Const.** amend. XI. The Amendment also prevents a federal court from entertaining a suit brought by a citizen of that state, absent waiver by the state. **See Seminole Tribe of Florida v. Florida**, 517 U.S. 44, 116 S. Ct. 1114 (1996); **Hans v. Louisiana**, 134 U.S. 1 (1980). However, "the eleventh amendment bars judicial action, not action by Congress or the executive branch." **Ellis Fischel State Cancer Hospital v. Marshall**, 629 F.2d 563, 567 (8th Cir. 1980). Rather, "Courts have found no Eleventh Amendment bar to actions brought by federal administrative agencies pursuant to complaints of private individuals." **Id.; see also Tennessee Dep't of Human Serv. v. United States Dept. of Education**, 979 F.2d 1162 (6th Cir. 1992). The **Marshall** Court noted that "[i]mplicit in these cases is the conclusion that administrative action against states pursuant to individual complaints does not run afoul of the eleventh amendment. For it would be absurd to hold that the eleventh amendment did not bar the Secretary from bringing a lawsuit, but did bar the Secretary from proceeding administratively to determine if the lawsuit was warranted." **Ellis Fischel State Cancer Hospital v. Marshall**, 629 F.2d 563, 567 (8th Cir. 1980), *cert. denied*, 450 U.S. 1040 (1981).

I conclude, based upon the above analysis, and cited precedents, that this Court, as an administrative body, is not barred by the Eleventh Amendment in rendering a recommended decision in this matter. **Cf. McMahan v. California Water Quality Control Board**, 1990-WPC-1 (Sec'y July 16, 1993). Thus, it is unnecessary to address the several arguments raised by the parties in regard to the Eleventh Amendment and immunity and waiver. (CX 130; CX 131; EX 123; EX 125; EX 127)[52] Accordingly, I hereby reject Respondent's Eleventh Amendment defense to liability.

Next, I would briefly like to address Respondent's alternative argument that internal complaints do not constitute protected activity under a strict interpretation of the Solid Waste Disposal Act. The express language of the SWDA does not prohibit discrimination against an

[52] I pause to note, that while the Eleventh Amendment does not bar this administrative proceeding, it could apply in the event that a private party petitions a judicial court for enforcement of an administrative award. **See Georgia Dept. of Human Resources v. Nash**, 915 F.2d 1482, 1486 n.14 (11th Cir. 1990).

employee who raises internal complainants.[53] Therefore, Respondents argue, it is unconstitutional to hold RIDEM liable on the grounds that they were not on notice. I reject this argument.

Despite the fact that the statute does not expressly list internal complainants as an example of protected activity, the Secretary of Labor has repeatedly held that the reporting of safety or quality concerns internally to one's employer is protected activity under the Solid Waste Disposal Act. **See Dodd v. Polysar Latex**, 1988-SWD-4 (Sec'y Sept. 22, 1994); **Conaway v. Instant Oil Change, Inc.**, 1991-SWD-4 (Sec'y Jan. 5, 1993). The Secretary has noted that, "An employee's internal complaints are the first step in achieving the statutory goal of promoting safety." **Dodd v. Polysar Latex**, 1988-SWD-4 (Sec'y Sept. 22, 1994). Accordingly, I conclude that Respondent had sufficient notice to be held liable under this Act. Further, I find and conclude that Complainant made numerous internal complaints to RIDEM officials concerning how the RCRA program was being compromised and jeopardized by Respondent's actions. Therefore, I, for the above stated reasons, reject Respondent's constitutional argument, and conclude that RIDEM can be held liable under the SWD, provided that Complainant meets her burden, as shall now be discussed.

IV. DISCUSSION

This case proceeded to a full hearing on the merits. Accordingly, examining whether or not Complainant has established a **prima facie** case is no longer particularly useful and this Administrative Law Judge shall consider whether, viewing all of the evidence as a whole, the Complainant has shown, by a preponderance of the evidence, that she was discriminated against for engaging in protected activity. **See Boudrie v. Commonwealth Edison Co.**, 1995-ERA-15 (ARB Apr. 22, 1997); **Boytin v. Pennsylvania Power & Light Co.**, 1994-ERA-32 (Sec'y Oct. 20, 1995); **Marien v. Northeast Nuclear Energy Co.**, 1993-ERA-49/50 (Sec'y Sept. 18, 1995). To carry that burden Complainant must prove that Respondent's stated reasons for reprimanding Complainant are pretext, **i.e.**, that they are not the true reasons for the adverse action and that the protected activity was. **Leveille v. New York Air Nat'l Guard**, 1994-TSC-3/4 (Sec'y Dec. 1, 1995); **Hoffman v. Bossert**, 1994-CAA-4 (Sec'y 19, 1995). It is not sufficient that Complainant establish that the proffered reason was unbelievable; she must establish intentional discrimination in order to prevail. **Leveille, supra**.

[53] The text of the SWDA expressly prohibits discrimination against an employee who: "has filed, instituted, or caused to be filed or instituted any proceeding under this chapter or under any applicable implementation plan, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter or of any applicable implementation plan." 42 U.S.C § 6971.

Complainant's engagement in protected activity has been overwhelmingly established in this case. She raised complaints both internally within her chain of command, and externally to the EPA.[54] I found Complainant's testimony most credible and convincing on this issue. Specifically, I find that from the 1996 proposed reorganization to the present, Complainant has repeatedly raised her concerns that RIDEM was taking action that compromised the RCRA enforcement program. Complainant's concerns were that the procedures, methods, and policies of RIDEM were causing direct violations of the RCRA. I find and conclude that these actions constitute protected activity under the Act. Complainant repeatedly complained of excessive re-inspections and revisions which, in her belief, violated the RCRA's mandate of timely and appropriate enforcement in many cases. Complainant testified that her concerns, at that time, were that RIDEM's actions were in violation of the RCRA, the EPA's mandates, and compromised the public health and the environment.[55] Further, Complainant repeatedly raised issues whenever she became aware of the possible misuse of federal funds.

Similarly, the evidence clearly establishes that Respondent knew of Complainant's engaging in these protected activities, as her complaints were always logged with her first line supervisor and elsewhere in her chain of command. At a minimum, Mr. Mulhare, Mr. Albro, Mr. Szymanski, Ms. Marcaccio, Mr. Fester and then-Director McLeod, were all aware of Complainant's concerns about the appropriateness of specific RIDEM actions, as well as her complaints that the office-wide policy shift was creating a situation where the RCRA was being violated, and not enforced.

Even though Respondent disagreed with Complainant's insistence about the proper RCRA procedures, Respondent has not shown that Complainant's position was unreasonable. **See generally Yellow Freight Sys. v. Reich**, 38 F.3d 76 (2d Cir. 1994) (wherein the Court held an employee need not prove the existence of an actual safety defect to have engaged in protected activity under an analogous whistleblower statute, the Surface Transportation Act); **Crow v. Noble Roman's, Inc.**, 1995-CAA-8 (Sec'y Feb. 26, 1996) (the CAA protects employee's work refusal that is based on a good faith, reasonable belief that doing the work would be unsafe or unhealthy); **Minard v. Nerco Delamar Co.**, 1992-SWD-1 (Sec'y Jan. 25, 1994) (concluding that whistleblower protection applies to where a complainant is mistaken, so long as complainant's belief is reasonable); **Scerbo v. Consolidated Edison Co. of N.Y., Inc.**, 1989-CAA-2 (Sec'y Nov. 13, 1992) (protection is not dependent upon actually proving a violation). In fact, it is well established that Complainant arrived at her recommendations that the Respondent was violating the RCRA based on her extensive training and experience in the environmental enforcement area. Further, the evidence establishes that many of the enforcement actions in controversy were anything but clear cut.

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[54] The law is clear that both internal and external complaints are protected by the whistleblower statutes. **See Dodd v. Polysar Latex,** 1988-SWD-4 (Sec'y Sept. 22, 1994).

[55] I wish to stress that Complainant's concerns have consistently involved her perceived violations of the RCRA and the need for timely and appropriate enforcement. Complainant has not merely raised concerns where RIDEM's actions resulted in weaker enforcement, but she has also raised concerns where RIDEM sought a heavy penalty, outside the appropriate range.

Legitimate, Non-Discriminatory Reason for Adverse Action

As Complainant has proved the elements of her case, Respondents have the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons. **See Morris v. The American Inspection Co.**, 1992-ERA-5 (Sec'y Dec. 15, 1992). Significantly, Respondent bears only a burden of production, as the ultimate burden of persuasion of the existence of intentional discrimination results with the Complainant. **Texas Dep't of Community Affairs v. Burdine**, 450 U.S. 248, 254-55 (1981); **Dartey v. Zack Co. of Chicago**, 1982-ERA-2 (Sec'y Apr. 25, 1983). An employer's discharge decision is not unlawful even if based on mistaken conclusions about the facts, however, a decision will only violate the Acts if it was motivated by retaliation. **Dysert v. Westinghouse Electric Corp.**, 1986-ERA-39 (Sec'y Oct. 30, 1991).

Respondent contends that any alleged, adverse action taken against Complainant was for a legitimate, non-discriminatory reason. Respondent argues that the basis for the written reprimand[56] and one-day suspension[57] were valid, as were the memoranda of Director McLeod,[58] and the decision

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[56] Respondent argues that the written reprimand was based on valid evidence of Complainant violating her supervisor's orders to refrain from contacting non-RCRA employees directly, evidence of Complainant creating interpersonal problems with other officials, her using State letter head to threaten other employees, and other actions related to her relations with the criminal investigatory unit.

[57] Respondent argues that the one-day suspension was legitimately based upon Complainant's mishandling of the T.D. Mack case, and her failure to comply with supervisor's orders. Specifically, Respondent points to the fact that Complainant's drafted NOV, requesting a lower penalty, was in conflict with information contained in the investigator's file. Respondent notes that Complainant's inaccurate NOV, coupled with her complaints, severely delayed the issuance of and enforcement action in the case. Further, Respondent alleges that Complainant failed to adequately respond to Mr. Albro's two requests for information, and that such action was an example of her directly violating a supervisor's orders.

[58] Respondent argues that Director McLeod's memorandum did not serve a discriminatory purpose, because Director McLeod was merely responding to a perceived environmental threat. Despite the contradictory testimony, it is clear that the T.D. Mack site contained some serious environmental hazards. Respondent argues that the allegations in the press regarding the leaking drums caused great concern for officials at RIDEM and Director McLeod. Respondent asserts that because the file did not contain clear indication of leaking drums, and because Complainant was the inside source for the PEER press releases, Director McLeod felt compelled to write to Complainant, twice, to discern what information she had about any leaking barrels. Respondent argues that such action was strictly to discern whether or not a real environmental threat was posed and in no way a form of intimidation or harassment of Complainant based on alleged protected activity.

to limit Complainant's complainant's contact with the EPA.[59] Further, Respondent has addressed many of the circumstances to which Complainant cites as forms of harassment and discriminatory treatment, and argues that they were all based on a proper, legitimate motive wholly unrelated to any protected activity Complainant may have been involved in.[60]

I disagree. Rather, I conclude that all of Respondent's purported legitimate, non-discriminatory business reasons were actually based upon, and closely interwoven with, Complainant's protected activity. For example, I find that the Respondent's allegation concerning Complainant's insubordination in regard to her memoranda responses to Mr. Albro, and regarding the charges in CX 41 and CX 42, were actually based upon, or in response to Complainant's actions where she implicated her protected activity. Further, Director McLeod's memoranda directing Complainant to respond to his questions and threatening "corrective action" were the direct result of her engaging in protective activity by voicing her concerns about American Shipyard to both the EPA and PEER. I also find that Mr. Albro and Mr. Szymanski's statements regarding Complainant's communications with the EPA are actually in response to several EPA investigations of RIDEM, based on Complainant's protected disclosures. While Respondent cites to Complainant's alleged poor performance, the delays and conflicts RIDEM relies upon, actually involved the same cases and circumstances where Complainant was engaging in protected activity. Moreover, the cited delays were actually the result of micro-managing and obstruction by the Complainant's supervisors.

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[59] Respondent argues that the decision to have the EPA cease communications with Complainant was legitimately based upon Mr. Albro's alleged failure to receive messages from the EPA. Mr. Albro and Mr. Szymanski both testified to their belief that Complainant was not forwarding important information from the EPA, and that this was compromising the RCRA program. In response, they felt it was necessary to have the EPA directly contact either Mr. Albro or Mr. Mulhare for any information concerning the programs. Respondent asserts, although the testimony is contradictory, that this action in no way prevented Complainant from raising concerns to the EPA, or from contacting the EPA for her day-to-day assignments. Rather, Respondent's argue, it served to manage and control the information moving from the EPA to RIDEM.

[60] Respondent argues that all instances that Complainant say she was harassed are based on legitimate reasons. For example, Respondent alleges that the 1996 reorganization was based upon external pressure from the EPA, and a desire to form RIDEM, more like the CTDEM. Respondent alleges that over 500 people were affected by the reorganization, and that Complainant has failed to present any evidence that the plan was based on illegitimate motives to discriminate against her. Further, Respondent highlights that one reasons for the reorganization, and subsequent complaints regarding Complainant's performance, were based on her poor performance. Respondent cites to the numerous EPA yearly reviews which were critical of cases in which Complainant was involved, both before and after the reorganization. Additionally, Respondent alleges a long line of cases where the complainant's work was slowing down enforcement and where she was violating supervisor's orders. Respondent cites to exhibits CX 41 and CX 42, the so-called non-performance memoranda, as an example of Complainant's poor work performance, and stresses that those memoranda were in no way connected with any discipline taken against Complainant.

Accordingly, I conclude that the Respondent's propounded "legitimate, non-discriminatory reasons" for subjecting Complainant to a one-day suspension, and instances of discrimination and harassment, are actually tainted, as the basis for these "legitimate" reasons was really in retaliation for her engaging in protected activity. I find this situation closely analogous to **Passaic Valley Sewerage Commissioners v. United States Dep't of Labor**, 992 F.2d 474 (3d Cir.), **cert. denied**, 50 U.S. 964 (1993), where the Third Circuit held, where there was "no evidence that the Complainant's alleged personality or professional deficiencies [in interpersonal relations] arose in any other context outside his complaint activity," the Respondent's conclusion that the Complainant had a personality problem or deficiency of interpersonal skills was reducible in essence to the problems of the inconvenience the Complainant caused by his pattern of complaints. **Id.** at 481; **see also Dodd v. Polysar Latex**, 1988-SWD-4 (Sec'y Sept. 22, 1994) (concluding that what respondent viewed as poor attitude was nothing more than the result and manifestation of the Complainant's protected activity). I agree that this case presents a situation where all of Respondent's alleged "legitimate" reasons are essentially complaints about the inconvenience and difficulties caused by Complainant raising safety concerns. Therefore, I find and conclude that Respondent has failed to produce a legitimate, non-discriminatory reason for subjecting the Complainant to adverse action, and as a result, Complainant has met her claim for intentional discrimination and is entitled to damages. If, however, a reviewing authority concludes that Respondent has provided legitimate, non-discriminatory reasons for its actions, then I find and conclude that Complainant has proven that any such reasons are pretext, as shall now be discussed.

Pretext

I find and conclude that Complainant has presented adequate evidence to prove not only that the Respondent's proffered reasons for any adverse action pretext, but also that the Complainant was harassed and subject to disciplinary action in retaliation for engaging in protected activity. **Leveille v. New York Air Nat'l Guard**, 1994-TSC-3/4 (Sec'y Dec. 11, 1995). Respondent alleges that Complainant was subject to disciple in based upon her professional failures, and repeated instances of refusing to follow supervisors' orders. I find and conclude, however, that Complainant has proven that those reasons are invalid, and that the real motivation concerned retaliation against her because of her protected activity. I conclude that Complainant has proven that Respondents intentionally discriminated against her for engaging in protected activity.

I find that Respondent's reasons are pretext and that RIDEM's adverse actions were discriminatory in retaliation for Complainant engaging in protected activity. First, I find that RIDEM's purported reasons for the 1997 written reprimand are pretext. Complainant had raised a number of concerns about the reorganization, both before and after, noting how the RCRA program was being compromised. I find and conclude that this prompted Respondent to take disciplinary action against Complainant. I find that the investigation in early 1997 and the reprimand were invalid for a number of reasons: First, I find that Mr. Albro and Mr. Mulhare began a detailed investigation of Complainant for the purpose of bringing disciplinary action against her. Second, the information obtained and manufactured during that investigation, and relied upon by Respondent in issuing the written reprimand, was highly unreliable. The allegations of Mr. Cappelli, Mr. LaForge and Mr.

Hellested were all extremely biased, and that bias was well known to Mr. Albro and Mr. Mulhare. Mr. LaForge has a strong dislike of Complainant, and was attempting to "get" her, per the testimony of Ms. Raddatz. There was also compelling evidence that Mr. Cappelli's statements were unfounded, retaliatory, and incorrect. Further, Mr. Cappelli's reputation for holding a grudge was known to Mr. Mulhare and Mr. Albro, who also knew that Mr. Cappelli remained upset over Complainant's jurisdiction determination in the Chase Paint case. Third, I find that Respondent violated their own disciplinary procedure by issuing a written reprimand prior to counseling and an oral reprimand. Ms. Marcaccio testified that the usual disciplinary procedure would be modified in extreme situations, yet there was no evidence of why an increased penalty was justified at this time. Further, I find that the December 19, 1996 conversation between Mr. Albro, Mr. Mulhare and Complainant did not constitute a counseling/oral reprimand session, and also that their instruction for her not to speak directly to others was unclear and suspect. Fourth, I find that the allegations regarding misuse of state stationery would be valid, had not Mr. Albro also utilized State stationery for much the same purpose. Next, I note that Complainant acted entirely appropriately in regard to the financial summary report issue. The fact that RIDEM had sent in two, very different FSRs, indicated to the EPA that something was amiss. Thus, this was not only embarrassing for RIDEM, but also proper grounds for an EPA investigation. At all times, Complainant's actions were appropriate, however, Mr. La Forge's retaliatory intent was not. Finally, I am most moved by the fact that Complainant was not provided an opportunity to respond to the biased, one-sided allegations that formed the basis of the reprimand. Therefore, I find and conclude that Mr. Mulhare and Mr. Albro were frustrated by Complainant's protected activity, and decided on rail-roading Complainant through a retaliatory, disciplinary procedure, in hopes of stifling her concerns.

Next, I find Respondent's reasons for the Complainant's one-day suspension pretext, as the actual motivation was retaliation for her protected activity. Respondent argues that she was disciplined for delaying the process, relying on incorrect information, and failing to respond to supervisors' orders. I find such reasons pretext. Complainant raised protected and repeated concerns over the T.D. Mack case. She responded to all of Mr. Albro's memoranda and provided backup information which supported her findings. Even Mr. Szymanski, who disciplined her on grounds that she failed to respond to Mr. Albro's memoranda, testified that she did in fact respond. I find this entire T.D. Mack disciplinary occurrence a set-up against Complainant for discriminatory purposes. First, Complainant was reprimanded for not reviewing factual information, which she credibly testified was not in the file at the time of her review. Second, Complainant responded to all requests and adequately supported her position, which in itself was protected activity. Third, Mr. Albro utilized the procedure of asking for more information as a method of disciplining Complainant, as is readily apparent from the highly damaging evidence that Mr. Albro sent materials concerning the T.D. Mack case to Mr. Silverman at the EPA to devise a theoretical penalty to be used in connection with disciplining Complainant. (CX 86; CX 90) Further, I find and conclude that the entire internal proceeding was a sham. Mr. Szymanski was anything but an impartial arbitrator. Rather, he had been engaging in discussions about disciplining Complainant for over one year, based on Mr. Albro and Mr. Mulhare's complainants that Complainant's memoranda and concerns were a frustration. Further, Mr. Szymanski ordered the suspension without addressing Complainant's counsel's concerns. I also note that despite RIDEM's concerns about delays, the actual T.D. mack NOV was

not issued until May of 1998. Rather, I find that the Complainant had exerted a great deal of pressure on RIDEM supervisor's based upon her safety concerns. Further, Complainant's contact with the EPA resulted in a great deal of pressure on RIDEM. Thus, in summary, I find and conclude that Respondent manufactured a disciplinary procedure as a method of retaliating against Complainant.

Next, I find and conclude that Director McLeod's memoranda concerning the T.D. Mack case, and the PEER press release and withdrawal petition were acts of harassment designed to intimidate Complainant for her engaging in protected activity. Initially, I note that concern over the extent of an environmentally dangerous site, is certainly a reason for a supervisor to request more information from an underling. However, Director McLeod's reasoning is highly suspect. First, while he was concerned with the correct information and the real dangers of the site, at no point did he order investigators to revisit the site to determine the immediate threat to the environment. Further, while he was allegedly concerned about confidential information being released, he himself opened the entire file to the press. I find that the real intent of his memoranda was to intimidate Complainant with "corrective action" for raising her concerns outside of RIDEM to the EPA and PEER. Specifically, I find and conclude that Director McLeod's threat of adverse action should Complainant not comply, is nothing more than a bold threat based upon discriminatory motive. Complainant had a reasonable concern that RIDEM was not taking appropriate action on the American Shipyard case, and by releasing that information, it served to bring attention to RIDEM's failures. I note that whether or not there were leaking barrels at the site is not relevant to this inquiry, as I have found that Complainant's concern, and her testimony on this matter, was reasonable and credible. That embarrassment prompted Director McLeod's retaliatory memoranda. Complainant was not insubordinate, and properly responded to those memoranda, requesting that he speak with her attorney. Further, I find and conclude that the purported interest in finding out the facts about the site was pretext, and that the memoranda strictly sought to intimidate Complainant for engaging in protected activity.

Next, I find RIDEM's action in requesting the EPA to cease all communication with Complainant to be highly discriminatory and severely damaging to Complainant's reputation. I find and conclude that Mr. Albro's testimony that he felt that Complainant's contact with the EPA should be curtailed is unconvincing. Complainant had previously, and repeatedly, provided information to the EPA critical of Mr. Albro and the RIDEM program. Such information was used by the EPA in conducting an audit of the RCRA program, RIDEM's use of federal funds, and served as a basis for PEER's withdrawal petition. Suffice to say, RIDEM failures, highlighted by complaints to the EPA and others, created a great deal of external pressure and embarrassment for Mr. Albro and other RIDEM supervisors. I find that because of Complainant's repeated protected disclosures to the EPA, Mr. Albro and Mr. Szymanski sought to prevent Complainant's contact with the EPA. Despite the contradictory testimony on the extent of contact to be allowed, RIDEM sought to curtail Complainant's access to the EPA, and such motivation was an intent to discriminate.

Finally, I find that Complainant's claims of general harassment and retaliation are valid, as RIDEM engaged in continuous discriminatory action, lacking any legitimate motive. First, I find and conclude that Complainant was subject to general harassment based on her complaint about the

planned reorganization. Respondent seeks to overly simplify the situation, by alleging that Complainant is merely a disgruntled employee who was upset at not being able to report directly to a division chief. I disagree. While I do not find that entire reorganization discriminatory, I do find specific aspects of it adversely affecting Complainant in a retaliatory way. The placement under Mr. Mulhare was in direct violation of her job description, and placed her in a position where conflicts were sure to arise. I also note that while the EPA reports were critical of some of the pre-organization cases that Complainant was involved with, she credibly testified that they involved long running enforcement and jurisdictional disputes between the EPA and RIDEM. I find and conclude that she credibly explained the difference between professional differences of opinion, and the more severe conflicts between herself and RIDEM over actions that were in violations of the RCRA itself. I also find that from the fall of 1996 through 1997, Complainant was systematically isolated, subordinated and micro-managed, as she continued to raise concerns with the improper enforcement of the RCRA by RIDEM. Further, I find and conclude that the so-called non-performance memoranda drafted by Mr. Mulhare and Mr. Albro are nothing more than a veiled attempt to blame Complainant for the same problems that she had raised to her supervisors and the EPA. Further, I find Mr. Albro's actions and motivation for inquiring into Complainant's conversation with Ms. Blair of the EPA highly discriminatory. I also find Complainant's response to Mr. Szymanski's request regarding the American Shipyard case proper and not insubordinate. Mr. Szymanski's written request did not expressly prohibit Complainant from contracting and relying on the investigators, and her actions were appropriate.

In summary, I find and conclude that Complainant raised a great deal of concerns over the proper enforcement of the RCRA, and financial matters at RIDEM. Her actions were the source of a great deal of pressure for RIDEM management from the EPA, PEER and, eventually, the public. Further, RIDEM has been severely criticized and embarrassed by Complainant's protected activity. As a result, I find and conclude Respondent has clearly, continuously, and illegally discriminated against Complainant through harassment, disciplinary procedures, and outright threats. Accordingly, I find and conclude that all of Respondent's purported, legitimate reasons for taking adverse actions against Complainant are, in fact, pretext. Complainant has met her burden of proving that Respondent has intentionally discriminated against her for engaging in protected activity concerning the proper enforcement of RCRA. As such, Complainant is entitled to an award of damages.

First, however, I, very briefly, wish to touch upon the issue of dual motive analysis. Under dual motive analysis, a Respondent must establish, by a preponderance of the evidence, the existence of a legitimate reason for the taking of adverse employment action against a complainant, and that the Respondent would have taken the same action even if the employee had not engaged in protected conduct. **See Simon v. Simmons Foods, Inc.**, 49 F.3d 386, 389 (8th Cir. 1995); **Martin v. The Dept. of the Army**, 1993-SDW-1 (Sec'y July 13, 1995).

This Judge only reaches the dual motive analysis if I determine there is a legitimacy to the Respondent's stated reason for the adverse employment action, a conclusion which I have specifically rejected for the aforementioned reasons. Even so, I find and conclude the Respondent has failed to present sufficient evidence that they would have taken the same action if Complainant had not

engaged in protected activity, because the evidence establishes that Respondent's actions and positions were motivated entirely in response to Complainant raising quality concerns.

V. DAMAGES

This Judge, having found the Respondent in violation of the aforementioned whistleblower statutes, may issue a recommendation on damages to be awarded to Complainant. Complainant requests front pay, back pay, compensatory damages, equitable relief, and attorney fees and costs.

Reinstatement/Front Pay

Complainant originally testified that she was seeking reinstatement to her full former duties. In her post-hearing brief, however, Complainant notes that she no longer seeks to continue her employment with RIDEM. Following this lengthy and contentious hearing, Complainant concludes that the "retaliatory animus" "pervades her entire chain of command," and that "restoration of her former duties and position would not suffice to make her whole." Thus, Complainant concluded that the "only acceptable remedy is to leave state service entirely, with just compensation." (CX 126 at 202) Rather, Complainant requests an order of front pay for two years in the amount of $150,000.00.

Respondent challenges this request on a number of grounds. First, Respondent argues that Complainant has not left RIDEM's employment and that this Court lacks the authority to provide a judicial stamp of approval prior to her actually making the decision to leave her job.[61] In the alternative, Respondent argues that Complainant's request is not based on any documentary evidence to support the conclusion that $150,000.00 represents two year's salary plus benefits, and thus cannot be awarded. After careful analysis of this important issue, I side with Complainant.

As a brief review, Complainant was transferred from OCI to the Office of Technical and Customer Assistance in the fall of 1998. Respondent alleges that this transfer occurred at the mandate of the EPA, and involved a change for eight individuals. Further, Respondents argue that Complainant requested to be physically re-located. Complainant, on the other hand, alleges that she was physically and organizationally removed from the RCRA team as a retaliatory measure, and to prevent her from making future disclosures. Further, she has credibly testified to her being verbally attacked for entering the RCRA area, and she discussed the new requirement that she provide a warning to Mr. Albro or Mr. Mulhare should she ever wish to return to the physical location of the RCRA files. Complainant has also noted that her work duties have been severely curtailed, to the point where she has been working on the revision of a manual, and that her current position is a waste of her expertise and talent.

[61] RIDEM alleges that "[w]hile she certainly has the right to resign from RIDEM at anytime, there is no legal basis for her request for judicial approval of a voluntary separation from service." (EX 126)

The Secretary of Labor has held that when a complainant states at a hearing that reinstatement is not sought, the parties or the ALJ should inquire to why. If there is hostility between the parties and reinstatement would not be wise because of the irreparable damage to the employment relationship, the administrative law judge may decide to forgo reinstatement and order front pay. If, however, the complainant provides no strong reason for not returning to his or her former position, reinstatement should be ordered. If reinstatement is ordered, the respondent's back pay liability terminates upon the tendering of a bona fide offer of reinstatement, even if the complainant declines the offer. **See West v. Sys. Applications Int'l**, 1994-CAA-15 (Sec'y Apr. 19, 1995); **Dutile v. Tighe Trucking Co**., 1993-STA-1 (Sec'y Oct. 31, 1994).

In the present case, I find and conclude that Complainant's "transfer" in the fall of 1998 was discriminatory as a method to both retaliate against Complainant, and to remove her from a position where she could raise concerns about the RCRA program. Further, I find and conclude that Complainant, while retaining her former salary and position level, is, in actuality, performing menial tasks for a person of her expertise. I also find that the working relationship between Complainant and RIDEM has deteriorated long beyond the point of reconciliation. RIDEM employees have continually discriminated against Complainant for over two years, and they have tarnished her professional reputation. This Judge presided over twenty-three (23) days of hearings herein and it is readily apparent, even to the casual reader of the transcripts, that the employment relationship between Complainant and RIDEM long ago reached the point of no return and that Complainant's supervisors manifested such blatant hostility towards her for not being a 'team player.' Such hostility was readily apparent in the courtroom as each witness testified against Complainant, several not even looking in her direction, except when absolutely necessary. Complainant, in my judgement, cannot return to work at RIDEM. Therefore, I find and conclude that reinstatement of Complainant to her prior duties is not advisable. Accordingly, I find and conclude that an award of front pay if justified in this matter, once Complainant leaves her employment with RIDEM, and she has indicated in her post-hearing brief that she will shortly do so.

An award of front pay is calculated by determining the present value of the future earnings that a complainant would have earned, and then subtracting the anticipated future earnings. **See Doyle v. Hydro Nuclear Serv.**, 1989-ERA-22 (ARB Sept. 6, 1996). In the present case, Complainant has alleged that her salary and benefits for two years total $150,000.00. Respondent, while challenging this figure, has presented no evidence or testimony to contradict this Complainant's proposed rate. Further, Respondent has not submitted any evidence to justify an offsetting amount of future earnings for Complainant. Therefore, I find and conclude that Complainant is entitled to an award of front pay of $150,000.00, upon her resignation from RIDEM.[62]

Back Pay

[62]I noted, however, that Complainant must make a good faith effort to find alternate employment. Further, if Complainant should obtain new employment within the two-year period, a reduction in front pay is necessary.

Complainant requests an award of $15,000.00 in back pay, based on fifty-two days of lost wages. Complainant notes that she had to take twenty-five days of her annual sick leave for her stress leave in September through October, 1997. She notes that her one-day suspension was unpaid. Further, Complainant states that her supervisors denied a one-day leave request, which forced her to take a day off without pay. Finally, Complainant seeks payment for the five weeks of annual leave she used to prosecute this case.

Respondent objects to Complainant's request arguing that Complainant has failed to submit factual evidence to support the figure she proposes. Further, Respondent argues that the claim for stress leave occurred more than 30 days prior to filing of her claim, and is thus barred by the statute of limitations. Next, Respondent argues that the "stress leave" was denied by the finding of the Rhode Island Workers' Compensation, and thus she should be barred, by **res judicata**, from re-litigating the issue.

The "goal of back pay is to make the victim of discrimination whole and restore him [or her] to the position that he [or she] would have occupied in the absence of the unlawful discrimination." **Blackburn v. Martin**, 982 F.2d 125, 128 (4th Cir. 1992). In the present case, Respondent does not raise any specific objections to Complainant's one day of leave request, or the five weeks of annual leave needed to attend the trial. I find both requests are reasonable and recoverable in this matter. **See Creekmore v. ABB Power Sys. Energy Servs., Inc.**, 1993-ERA-24 (Dep. Sec'y Feb. 14, 1996) (approving a back pay award for time Complainant spent attending his trial). Additionally, I find and conclude that Complainant is entitled to back pay for the one day suspension, as I have previously concluded that this action was discriminatory.

I also find and conclude that Complainant's five weeks of stress leave are recoverable as back pay. Initially, I note that the stress leave, while occurring more than thirty (30) days prior to the filing of the first complaint, was the result of a seamless web of retaliation and discrimination that caused the emotional stress to Complainant.[63] Further, I find and conclude that Complainant's five-weeks of stress leave were a direct consequence of Respondent's discriminatory conduct, and as such, is compensable as back pay.[64]

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[63]I agree with Complainant's statement that this Court has jurisdiction to address discriminatory actions taking place outside of the 30-day statutory period when the complainant proves that he or she has been subjected to a continuing course of related discriminatory, as long as an adverse action has occurred within the 30 day period. **Connecticut Power & Light Co. v. Secretary of Labor**, 85 F.3d 89, 96 (2d Cir. 1996).

[64]In reaching this conclusion, I reject Respondent's argument that **res judicata** bars this claim. This Court is not bound by any finding or decision of the Rhode Island Workers Compensation Commission, as there is no evidence that the matter was previously litigated to a final judgment on the merits. **See Ewald v. Virginia**, 1989-SDW-1 (Sec'y Apr. 20, 1995). Further, neither the standard of proof, nor the burdens placed on the parties, are identical in the two proceedings. **Id.**

(continued...)

Complainant asserts that her request of $15,000.00 is "based upon a straightforward calculation of the number of work days missed as a proximate result of Respondent's discriminatory conduct as a percentage of her annual salary—a dollar amount well known to Respondent." (CX 132 at 8) I pause to note, that while this figure is "well known to Respondent," neither party has submitted direct evidence on this issue in terms of testimony or documentation. Nevertheless, Complainant is correct to note that any uncertainties with regard to the amount of back pay are to be resolved against the discriminating party. **McCafferty v. Centerior Energy**, 1996-ERA-6 (ARB Sept. 24, 1997). Thus, based upon the sworn arguments of Complainant's counsel, I find and conclude that Complainant is entitled to an award of back pay totaling $15,000.00, representing fifty-two days of lost wages.[65]

Compensatory Damages

In the present case, Complainant is requesting compensatory damages in the amount of $3 million based on three claims: (1) pain and suffering, mental anguish, embarrassment and humiliation; (2) adverse physical health consequences; and (3) loss of career and professional reputation.[66] Respondent challenges all requests on a number of grounds.

I must begin by noting that punitive damages are not allowable, absent express statutory authorization, in whistleblower cases, and that the SWDA whistleblower provision does not provide for such damages. **See** 42 U.S.C. § 6971. Further, a SWDA complainant may not attempt to sneak a punitive award through the wooden horse of compensatory damages. **Cf. Smith v. Esicorp, Inc.**, 1993-ERA-16 (ARB Aug. 27, 1998).[67] Complainant's request of $3 million in compensatory damages is astronomical, unsupportable, and essentially, a request for punitive damages that must,

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(...continued)
Accordingly, this Court is not barred from granting an award of back pay based, in part, on Complainant's five weeks of stress leave.

[65] This figure was derived as follows: Complainant alleges that her annual salary, plus benefits, totals $75,000.00. This works out to a per diem rate of $288.46, based on a working year of 260 days. Thus, $288.46 multiplied by 52 equals $14,999.92 or roughly $15,000.00.

[66]Complainant's request for $800,00.00 representing loss of insurance coverage shall be addressed separately, below.

[67]I noted that the facts in the **Smith** more clearly showed an intent to award large compensatory damages in order to "send a message." **Id.** In the present case, Complainant has not expressly requested compensatory damages for any other reasons than to compensate for her injuries. Nevertheless, I find such a large request, based on the present facts, is certainly an implied attempt at punitive action.

and hereby is, denied. That said, Complainant has presented a compelling case for the award of appropriate compensatory damages, albeit at a more reasonable amount than requested.

Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment and humiliation. **See generally DeFord v. Secretary of Labor**, 700 F.2d 281, 283 (6th Cir. 1983) (decided pursuant to the ERA); **Nolan v. AC Express**, 1992-STA-37 (Sec'y Jan. 17, 1995) (decided pursuant to an analogous provision of the STA). Where appropriate, a complainant may recover an award for emotional distress when his or her mental anguish is the proximate result of respondent's unlawful discriminatory conduct. **See Bigham v. Guaranteed Overnight Delivery**, 1995-STA-37 (ALJ May, 8, 1996) (adopted by ARB Sept. 5, 1996); **Crow v. Noble Roman's Inc.**, 1995-CAA-8 (Sec'y Feb. 26, 1996). **See also Blackburn v. Metric Constructors, Inc.**, 1986-ERA-4 (Sec'y Oct. 30, 1991). Complainant bears the burden of proving the existence and magnitude of any such injuries; although, as a caveat, it should be noted that medical or psychiatric expert testimony on this point is not required. **Crow v. Noble Roman's, Inc.**, 1995-CAA-8 (Sec'y Feb. 26, 1996); **Lederhaus v. Paschen**, 1991-ERA-13 (Sec'y Oct. 26, 1992); **Jones v. EG&G Defense Materials, Inc.**, 1995-CAA-3 (ARB Sept. 29, 1998).

It is appropriate to review other types of wrongful termination cases, as well as awards in other whistleblower decisions involving emotional distress, to assist in the analysis of the appropriate measure of compensatory damages in a whistleblower case. Accordingly, this is precisely what this Judge has done. **See Crow v. Noble Roman's, Inc.**, 1995-CAA-8 (Sec'y Feb. 26, 1996) (approving an award of $10,000.00 in compensatory damages);[68] **Creekmore v. ABB Power Sys. Energy Servs., Inc.**, 993-ERA-24 (Dep. Sec'y Feb. 14, 1996) (wherein the Deputy Secretary upheld the ALJ's recommendation of $40,000.00 in compensatory damages);[69] **Gaballa v. Atlantic Group, Inc.**, 1994-ERA-9 (Sec'y Jan. 18, 1996) (wherein the Secretary reduced the ALJ's recommended compensatory damage award from $75,000.00 to $25,000.00);[70] **Smith v. Littenberg**, 992-ERA-52

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[68] The evidence proved that the complaint was terminated without any warning, and could not afford insurance. The complainant also had to receive food stamps for a period of time.

[69] The ALJ found that the evidence established that the discriminatory conduct caused Complainant severe stress, leading to a heart attack. While questioning the sufficiency of the causative evidence in regard to the heart attack, the Deputy Secretary concluded that the record of the stress claim and pain attacks was sufficient to justify the award of compensatory damage. Specifically, the Deputy Secretary noted that the complainant suffered a great deal of embarrassment over a lay off after twenty-seven years with employer, and that complainant suffered family disruption by his need to travel for consulting work.

[70] The ALJ recommended a $75,000 compensatory damage award based on the treating psychologist's finding that complainant suffered from chronic stress, paranoid thinking, a general distrust of others, a lack of confidence in his engineering judgment, a fear of continuing repercussions, and a general feeling of apathy. The psychologist further testified complainant will forever suffer (continued...)

(Sec'y Sept. 6, 1995) (wherein the Secretary affirmed the ALJ's award of $10,000.00);[71] **Blackburn v. Metric Constructors, Inc.**, 86-ERA-4 (Sec'y Aug. 16, 1993) (wherein the Secretary reduced the ALJ's recommended award of compensatory damages to $5,000.00);[72] **Lederhaus v. Paschen**, 1991-ERA-13 (Sec'y Oct. 26, 1992) (wherein the Secretary reduced the compensatory award from a recommended amount of $20,000.00 to $10,000.00);[73] **McCuistion v. Tennessee Valley Auth.**, 1989-ERA-6 (Sec'y Nov. 13, 1991) (wherein the Secretary increased compensatory damages from the ALJ's recommended award of $0.00 to $10,000.00);[74] **Martin v. The Department of Army**,

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(...continued)
from a full-blown personality disorder and a permanent strain on his marital relationship. The Secretary reduced the award based on the fact that the same psychologist indicated this psychological state was caused in part by a co-respondent who had previously settled out of the case and that part of that settlement compensated for part of complainant's compensatory damages.

[71] The evidence established that the complainant suffered from severe mental and emotional stress, including psychiatric evidence that the complainant was "depressed, obsessing, ruminating and ha[d] post-traumatic problems," following the discriminatory discharge.

[72] The testimony of complainant, his wife, and his father established complainant was of the opinion that firing someone was like saying that person is no good. The evidence also established complainant felt really low and that he relied on his father to come out of depression. The termination affected complainant's self-image and impacted his behavior, which became short with his wife. The wife testified to the stress and emotional strain on the marital relationship and the father testified to complainant's pride and work ethic and the fact that complainant felt sorry for himself after the termination.

[73] In **Lederhaus**, the evidence established complainant remained unemployed for 5 ½ months after his termination, he was harassed by bill collectors, foreclosure was begun on his home and he was forced to borrow $25,000 to save the house. In addition, complainant's wife received calls at work from bill collectors and her employer threatened to lay her off. Complainant had to borrow gas money to get to an unemployment hearing and experienced feelings of depression and anger. Complainant fought with his wife and would not attend her birthday party because he was ashamed he could not buy her a gift, the family did not have their usual Christmas dinner, and complainant would not go to visit his grandson. In fact, complainant cut off almost all contact with his grandson. The evidence revealed complainant became difficult to deal with and this was corroborated by testimony from complainant's wife and a neighbor. Complainant contemplated suicide twice.

[74] The evidence revealed the complainant was harassed, blacklisted, and fired. In addition, complainant lost his livelihood, he could not find another job, and he forfeited his life, dental and health insurance. The blacklisting and termination exacerbated complainant's pre-existing hypertension and caused frequent stomach problems necessitating treatment, medication, and emergency room admission on at least one occasion. Complainant experienced problems sleeping
(continued...)

1993-SDW-1 (ARB July 30, 1999) (wherein the ARB awarded $75,000.00 in compensatory damages for emotional distress);[75] **Jones v. EG&G Defense Materials, Inc.**, 1995-CAA-3 (ARB Sept. 29, 1998) (wherein Board adopted ALJ's award of $50,000.00);[76] **Smith v. Esicorp, Inc.**, 1993-ERA-16 (ARB Aug. 27, 1998) (wherein the Board reduced the ALJ's recommendation of $100,000.00 in compensatory damages to $20,000.00);[77] **Michaud v. BSP Transport, Inc.**, 1995-STA-29 (ARB Oct. 9, 1997) (wherein the Board approved an award of $75,000.00 in compensatory damages);[78] **Doyle v. Hydro Nuclear Services**, 1989-ERA-22 (ARB Sept. 6, 1996) (wherein the Board affirmed the ALJ's recommendation of $40,000 compensatory damages);[79] **Bigham v. Guaranteed Overnight Delivery**, 1995-STA-37 (ALJ May, 8, 1996) (adopted by ARB Sept. 5, 1996) (wherein the Board increased the ALJ's award of compensatory damages from $2,500 to $20,000 after reviewing the

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(...continued)
at night, exhaustion, depression, and anxiety. Complainant introduced into evidence medical documentation of symptoms, including blood pressure, stomach problems, and anxiety. Complainant's wife corroborated his complaints of sleeplessness and testified he became easily upset, withdrawn, and obsessive abut his blood pressure.

[75] The evidence revealed severe emotion distress based upon psychological records of major depression and suicidal thoughts.

[76] The evidence Complainant suffered embarrassment from having to look for work, and having his car and home repossessed. Evidence also reflected stress due to loss of medical insurance and familial stress.

[77] The evidence established that the discriminatory conduct was limited to several cartoons lampooning complainant, and that the complainant did not suffer loss of a job or blacklisting and did not incur financial losses, and evidence of mental and emotional injury was limited to his own testimony and that of his wife.

[78]The evidence established that complainant suffered from major depression caused by a discriminatory discharge, as supported by reports of a licensed clinical social worker and psychiatrist. Further, evidence showed increased stress and humiliation at having a bank foreclose on Complainant's home and the loss of savings.

[79]The evidence which supported an award in this amount consisted of complainant's consulting physicians who prescribed anxiety and depression medications, as well as other medications for chest pain; a treating psychologist testified that respondent's discriminatory acts caused complainant's anxiety disorder and post-traumatic stress disorder and respondent failed to offer any countervailing evidence on causation; and that same psychologist testified complainant's wife and children noticed a radical change in complainant's behavior, a serious strain in the marital relationship, and that divorce proceedings were begun, although the couple did eventually reconcile.

observations and accounts of complainant's emotional distress);[80] **Sayre v. Alyeska Pipeline**, 1997-TSC-6 (ALJ May 8, 1999) (wherein ALJ awarded $10,000.00 in compensatory damages)[81]; **Leveille v. New York Air Nat'l Guard**, 1994-TSC-3/4 (ALJ Feb. 9, 1998) (wherein ALJ awarded over $80,000.00 in compensatory damages based upon past and future emotional stress, past and future medical expenses, and damage to professional reputation);[82] **Berkman v. United States Coast Guard Academy**, 1997-CAA-2/9 (ALJ Jan. 2, 1998) (wherein the ALJ awarded $70,000.00 in compensatory damages).[83]

In **Van Der Meer v. Western Kentucky Univ.**, 1995-ERA-38 (ARB Apr. 20, 1998), the complainant suffered little out-of-pocket loss: he lost no salary as a result of the leave of absence and there was no evidence of uncompensated medical costs. Other losses were non-quantifiable. The complainant, however, was awarded $40,000 in compensatory damages because the respondent took extraordinary and very public action against the complainant which surely had a negative impact on complainant's reputation among the students, faculty and staff at the school, and more generally in the local community; complainant was subjected to additional stress by the respondent's failure to follow the conciliatory procedures contained in its handbook and complainant testified that he felt humiliated.

In **Smith v. Esicorp, Inc.**, 1993-ERA-16 (ARB Aug. 27, 1998), the ARB noted that, "The severity of the retaliation suffered by [a complainant] is also relevant to our determination of appropriate compensatory damages. The courts have held that the more inherently humiliating and degrading the defendant's action, the more reasonable it is to infer that a person would suffer emotional distress, and the more conclusory the evidence of emotional distress may be." **Id.** (citing **United States v. Balistrieri**, 981 F.2d 916, 932 (7th Cir. 1993)).

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[80]At the hearing, the complainant testified to his lowered self-esteem and uncommunicativeness, to his change in sleep and eating habits, and to the adverse effect on his marriage. He also testified that he was not interested in socializing, felt 'less than a man' because he could not support his family, and that the family experienced a sparse Christmas. Finally, complainant testified the family had to cancel their annual summer vacation and charge the credit cards to the limit. Complainant's wife testified she noticed complainant's withdrawal in the weeks after Christmas.

[81] The complainant testified to severe stress caused by work-place discrimination.

[82]The evidence established severe emotional pain and suffering. Further the complainant suffered from anxiety attacks, shortness of breath and dizziness caused on the work-related stress. The complainant also submitted evidence of marital friction, and psychological evidence of depressive disorder dysthmia. The complainant requested $130,000.00 in compensatory damages, but the ALJ only awarded $45,000.00 for past and future emotional pain; $25,000.00 in loss of professional reputation and $10,529.28 for past and future medical costs.

[83] The evidence established that complainant suffered from clinical, major depression require medication and therapy, in addition to suffering from frequent anxiety attacks.

Pain, Suffering, Mental Anguish, Embarrassment and Humiliation

Complainant is seeking $750,000.00 in compensatory damages based upon her mental anguish, humiliation and suffering directly caused by Respondent's discriminatory conduct. Respondent argues that any stress and emotional strain suffered by Complainant preceded her claims in this matter, and are unrelated to Respondent's conduct. Further, Respondent notes that RIDEM employees tried to assist Complainant by recommending her to the Employee Assistance Program to help her manage and deal with any stress from which she may have been suffering from.

I find that Complainant has submitted sufficient evidence justifying a claim for compensatory damages based on her severe emotional pain and suffering cause by Respondent's discriminatory conduct. Complainant has testified concerning how, as a result of RIDEM's alleged discrimination and harassment, she has suffered substantial emotional, physical and professional harm. (TR 381-93) Additionally, Complainant has submitted medical records from Nephrology Associates, Harvard Pilgrim Healthcare, the RIDEM Medical Monitoring Program, and the RI EAP, to substantiate her claim. (CX 36-39) These records reflect a two year period of Complainant's suffering from severe stress, sleep disorders, anxiety and symptoms of clinical depression. (CX 36-39) The records of Dr. Stephen Zipin indicate serious stress disorder and problems during 1996 through 1998. (CX 36; CX 62; CX 64; CX 65; CX 67) Further, in late 1997, Complainant met with Counselor Raymond Cooney, and psychiatrist Dr. Giselle Corre, both of whom noted the "severe stress from work-related issues," and recommend that Complainant take time off from work on stress leave. (CX 61) As a result, Complainant then took five weeks of stress leave in September and October of 1997, as well as other occasional days off. (TR 387) Complainant also alleges that she has been emotionally strained, and that her family has been severely impacted by her stress. In fact, her husband, Joseph Migliore, relayed his concern about Complainant's stress and its effect on their family to Mr. Fester who shared this information with Ms. Marcaccio.

I find and conclude that Complainant has suffered over two years of continuous and severe harassment by Respondents.[84] I reject Respondent's argument that Complainant's stress over the reorganization is unrelated to this current claim. Rather, I have previously held that Complainant began engaging in protected activity, for the purposes of these claims, in mid-1996 when she was voicing her concerns about the negative effects of the reorganization and her reassignment. I also have found that Respondent's retaliatory actions, in the form of harassment, began at this time. Complainant's supervisors were aware that Complainant was being subject to a great deal of stress by their actions, yet the discrimination and retaliation continued, through undermining her authority, subjecting her to disciplinary actions, and threatening her with future retaliation for engaging in protected activity. I also reject Respondent's argument that it helped Complainant's stress, by referring her to the EAP. While it is true that Ms. Marcaccio did refer Complainant based upon her alleged concern for Complainant's mental health, Ms. Marcaccio also provided the EAP with negative information stemming from Complainant's protected activity.

[84]This record reflects the most voluminous set of medicals records in any whistleblower matter over which I have presided.

Accordingly, I find and conclude that Complainant has submitted a well-documented and well-supported claim for compensatory benefits based on emotional distress. I also note, in comparison with similarly situated cases, that Respondents's awareness of Complainant's stress disorder and anxiety, make their actions particularly offensive. I also find that the medical record documentation presented, coupled with Complainant credible testimony presents one of the strongest cases for compensatory damages, I have ever seen. Therefore, I find and conclude that Complainant is entitled to $100,000.00 in compensatory damages based upon her claim of emotional distress.

Adverse Physical Health Consequences

Complainant is seeking $750,000.00 in compensatory damages based upon her adverse physical health consequences directly caused by Respondent's discriminatory conduct. Respondent, on the other hand, argues that Complainant has failed to present sufficient evidence to document her claim.

I note, that in **Varnadore v. Oak Ridge Nat'l Laboratory,** 1992-CAA-2/5 and 1993-CAA-1 (ALJ June 7, 1993), the Administrative Law Judge found that the complainant was not entitled to an award of compensatory damages based upon adverse health consequences where the Complainant's evidence was merely speculative.

I find and conclude, that upon review of the evidence, Complainant has more than adequately proved that she has suffered physical consequences, as a result of Respondent's actions, and that such actions have resulted in higher co-payment for Complainant, as well as general adverse health conditions. I find that Complainant has candidly and honestly testified to the circumstances surrounding her kidney transplant that occurred prior to the 1996 reorganization. Complainant alleges that her fragile physical health condition has worsened and she has suffered additionally as the direct result of her work-related stress. (TR 377) Complainant also had joint problems, and requested a closer parking space. (TR 379) This condition prompted Mr. Albro to object to her engaging in field inspections. Complainant is also on medication for high blood pressure, and her levels increased during this period, according to her nephrologist, Dr. Zipin. (TR 388) I find that Complainant's physical condition, as impacted by her work-related stress and anxiety, is well documented in the medical records of Dr. Zipin and the EAP. (CX 39; CX 36; CX 63)

Accordingly, based upon the medical records submitted, coupled with Complainant's testimony, I find that Complainant is entitled to compensatory damages based on her adverse health condition. Further, after a comparison of these facts to other whistleblower cases involving compensatory damages based on adverse medical conditions, I find and conclude that Complainant is entitled to an award of $50,000.00.

Loss of Career and Professional Reputation

Complainant is seeking $1,500,000.00 in compensatory damages based upon her loss of career and professional reputation directly caused by Respondent's discriminatory conduct.

Complainant alleges that her professional reputation has been irreparably harmed by Respondent's actions of 'bad-mouthing' Complainant to individuals both inside and outside the agency. (TR at 5231) Complainant stresses that this action is particularly damaging in light of her professional circumstances: mainly, she has a very narrow career specialty, and that her physical and family limitations require her to stay in Rhode Island. Complainant alleges that her career is ruined and that she no longer wishes to work for RIDEM because of the deterioration of her relationship. Respondent, however, argues that "Complainant's reputation is exactly what she made it," **i.e.**, by not being a team player. Further, Respondent highlights that the EPA audits were critical of cases under Complainant's control both before and after the reorganization. Therefore, Respondent reasons that her reputation with the EPA was already negative.

I find Complainant's situation most compelling on the grounds that her professional reputation has been repeatedly and severely tarnished by Respondent's retaliatory actions. Further, I find and conclude that the facts of this case are much more severe than any other whistleblower case to date.

In **Van Der Meer v. Western Kentucky Univ.**, 1995-ERA-38 (ARB Apr. 20, 1998), the ARB awarded a complainant $40,000.00 in compensatory damages for loss of professional reputation where Complainant was "physically escorted from his classroom by the campus police, in front of his students, and then hustled through gathering up some personal effects from his office under the watchful eye of the police." The Board found that the extraordinary and very public action against the complainant "surely had a negative impact on [the complainant's] reputation among the students, faculty and staff at the school, and more generally in the local community."

I find that Complainant's reputation has suffered severely at the hand's of RIDEM. Complainant has been criticized directly, and through veiled, posted memoranda, in front of her staff. Her reputation among her RIDEM superiors is ruined. She has repeatedly been criticized openly to both outside entities contracting with RIDEM, as well as, and most significantly, EPA officials. All of these actions serve to severely curtail Complainant's chance of obtaining comparable work in the Rhode Island community. I note that Complainant's situation is made much more severe by a number of special factors, including the fact that she must remain in the Rhode Island area for health and family reasons. Further, Complainant is an acknowledged expert in the RCRA program, which severely limits her employment prospects beyond RIDEM and the EPA. Thus, I agree with Complainant's allegation that "Respondent's actions to damage her reputation leave her with few if any mitigative options for finding fulfilling and appropriate new employment in her area of expertise."

I noted, that like the complainant in **Van Der Meer**, Mrs. Migliore was subject to discriminatory actions that were quite public, such as the postings around RIDEM office that, while not mentioning Complainant by name, clearly indicated that her complaints were unfounded. Further, RIDEM's criticisms to the EPA were very public tarnishing of her professional reputation among the environmental community. I find, however, that the facts of the present case are much more egregious than those in **Van Der Meer**. The complainant in **Van Der Meer** was a college professor, whose skills could translate to other university, colleges or schools. Further, there was no impediment to his travel. Complainant, on the other hand, is an expert is an extremely specialized

field where she developed over thirteen years experience with RIDEM. Her experience is limited to this specialized field, and now her reputation has been ruined among RIDEM employees, the Region One EPA, and the Rhode Island Community in general.

I find it terribly unfortunate that Complainant's professional reputation could become so scarred, merely for raising safety and environmental concern with Rhode Island's Department of Environmental Management. I recognize that the posting of this decision, as shall be addressed below, will go to some length to try to resurrect Complainant's tarnished reputation. Nevertheless, I find and conclude that Respondent's actions have been so egregious in ruining Complainant's reputation among other RIDEM employee's, undermining her staff, and discrediting her with the EPA, that Complainant is entitled to significant compensatory damages for her loss of reputation.

According, upon my review of relevant case law and the facts of this matter, I find and conclude that Complainant is entitled to an award of $250,000.00 in compensatory damages based upon damage to her professional reputation.

Total Compensatory Damages

Accordingly, I find and conclude that Complainant is entitled to compensatory damages totaling $400,000.00, based upon her mental anguish, adverse health consequence, and damage to her professional reputation. I note that this award is higher than any other award previously awarded by an administrative law judge, however, I base my decision on my finding that this case presents a factually scenario so severe as to warrant significant compensatory relief. This Judge has concluded that Complainant has presented a most compelling case of repeated and continuous discrimination and retaliation that has resulted in Complainant suffering greatly at the hands of RIDEM, most particulary her mental health has been compromised, and her professional reputation has been destroyed, perhaps forever.

Insurance Coverage

Complainant is requesting an award of $800,000.00 representing her loss of insurance coverage for the next twenty years. Specifically, Complainant claims that "because of [her] poor health condition, her loss of state health and life insurance benefits will cause [her] potentially catastrophic consequences unless she is adequately compensated." (CX 126 at 206) In support, Complainant alleges that her "pre-existing condition makes it high [sic] unlikely or impossible that she will be able to secure sufficient affordable coverage and benefits once her state benefits are lost." (CX 126 at 206) Complainant reached her total of $800,000.00 "based upon a calculation of the costs to Complainant to maintain her current level of coverage for 20 years." (CX 126 at 207) In the alternative, Complainant requests that Respondent be ordered to "maintain Complainant's current

package of benefits for twenty years, or until Complainant is able to secure new employment with comparable benefits." (CX 132)[85]

Respondent challenges this award on the grounds that "[n]othing . . . supports this claim" and that Complainant has failed to submit any evidence as a basis for her "calculation." (EX 126 at 6) Further, Respondent argues that Complainant is still employed and covered by state health and life insurance, therefore she has not lost anything. Finally, Respondent argues that even if Complainant were to resign, the state should not be liable.[86]

I agree with Complainant, in part. I have already determined that Complainant shall be entitled to two years of front pay. Therefore, I find that it is fair and reasonable to also award Complainant two years of insurance coverage and benefits. In making this determination, I am slightly wary of Complainant's request which includes $40,000.00 of coverage of year. I am not willing to accept this figure, absent more compelling, documentary evidence. Accordingly, I hereby adopt and modify Complainant's alternate argument. I hereby Order Respondent to maintain Complainant's current package of benefits for two years following her termination of her employment relationship with RIDEM. I note, however, that if Complainant obtains new employment, with benefits, within the two-year period, a reduction in coverage is appropriate and necessary.

Other Equitable Relief

Complainant requests four forms of equitable or injunctive relief, in this proceeding, all of which are objected to by Respondent as legally and factually impermissible.[87] First, Complainant requests that Respondent purge her personnel file "of any derogatory or false information, including but not limited to the March 1997 reprimand, the April 1998 suspension, and any and all other documentation that reflects, implies or demonstrates discussion of Complainant's poor performance or violation of personnel rules and policies or in any other way casts Complainant in a negative light." (CX 126 at 209) Respondent, however, rejects this claim, stating that Complainant's request

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[85]While Compliant makes this request under her claim for compensatory damages, I shall discuss this issue separately, as it may involve either monetary damages or equitable relief.

[86]Respondent argues that, even if Complainant left RIDEM, her benefits would not be in jeopardy because "she will be entitled to full insurance coverage through her husband, Joe Migliore." Respondent noted that Mr. Migliore "is a valuable RIDEM employee who will continue his employment and benefits with the State."

[87] I pause to note that Complainant's request for reimbursement for the retainer fee she paid to her first two attorneys will be addressed under the Attorney Fee section of this Recommended Decision and Order.

amounts to a "super appeal."[88] I hereby recommend that this request be granted, in part, and I reject Respondent's objections. Complainant's three claims are validly before this Court, and, having succeeded on all three, she is entitled to relief. Respondent is hereby ordered to cease and refrain from discriminating against Complainant based upon her now-recognized protected activity. Further, Respondent is hereby ordered to immediately expunge Complainant's personnel file of any and all negative references related to her protected activity. **See McMahan v. California Water Quality Control Bd.**, 1990-WPC-1 (Sec'y July 16, 1993).

Second, Complainant requests that Respondent be ordered to "publish, through news release and correspondence with EPA Region One, a retraction of all negative and false statements, reports and comments made to outside entities about Complainant's professional performance and abilities." (CX 126 at 209) I hereby deny this request as too broad and cumbersome. Rather, I hereby recommend that Respondent post a written notice in a centrally located area frequented by most, if not all, of Respondent's employees for a period of sixty (60) days, advising its employees that the disciplinary action taken against Complainant have been expunged from her personnel record and that Complainant's claims have been decided in her favor. Further, I hereby recommend that Respondent make available the Final Order of the Administrative Review Board and/or Secretary of Labor, when issued, to any employee or individual requesting it. Further, I recommend that Respondent forward a copy of the final order of the Administrative Review Board and/or Secretary of Labor to the EPA Region One office.

Third, Complainant requests that Respondent be ordered to "furnish her with a positive, agreed-upon letter of recommendation." (CX 126 at 209) I hereby recommend that this request be denied as beyond the scope of this Recommended Decision and Order as unnecessary. However, Respondent is hereby ordered to refrain from taking any discriminatory action against Complainant based on her protected activity. Thus, Respondent should not provide a negative reference based solely or in part on Complainant's protected disclosures. Nevertheless, this Court refuses to order Respondent to write a compromise letter of recommendation with Complainant.

Finally, Complainant requests that Respondent, and its officers, "be ENJOINED from providing anything but positive references and comments with respect to Complainant to prospective employers, members of the news media, and any other individual who may inquire about Complainant in the future." (CX 126 at 209) (emphasis in original). I find and conclude that this request is too broad. Rather, I hereby recommend that Respondent be Ordered to cease all discriminatory action, and refrain from taking retaliatory action against Complainant in the future based upon her protected activities as noted in this Recommended Decision and Order. Should Respondent engage in

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[88] Specifically, Respondent alleges that Complainant "seeks to 'reverse' a final worker's compensation ruling through this action, [and] she seeks to remove a 1997 reprimand that she never contested. She also seeks to remove a notice from her personnel file of the 1998 one-day suspension even though her appeal of it to the State Personnel Appeals Board was dismissed." (EX 126 at 8) As noted, this Court is not bound by any action of a state agency.

discriminatory conduct in the future, Complainant's proper avenue of relief is through filing a new complaint with the Department of Labor.

VI. ATTORNEY FEE & COSTS

Under the SWDA, a prevailing party in a so-called whistleblower case is entitled to recover costs for attorney fees and expenses. 42 U.S.C. § 6971. In this context, a party may be considered to have prevailed if he or she succeeds on any significant issue in litigation which achieves some of the benefits the party sought in bringing the suit. **Hensley v. Eckerhart**, 461 U.S. 424, 433 (1983). I have found and concluded that Complainant is a prevailing party, and thus, her counsels are entitled to a reasonable fee.

In calculating attorney fees under the whistleblower statutes, an administrative law judge should usually utilize the lodestar method that requires multiplying the number of hours reasonably expended in bringing the litigation by a reasonable hourly rate. **See Clay v. Castle Coal and Oil Co., Inc.**, 1990-STA-37 (Sec'y June 3, 1994). The fee petition must be based on records providing details of specific activity taken by counsel and indicating the date, time and duration necessary to accomplish the specific activity. **Sutherland v. Spray Sys. Envtl.**, 1995-CAA-1 (ARB July 9, 1996); **West v. Sys. Applications Int'l**, 1994-CAA-15 (Sec'y Apr. 19, 1995). Complainant's counsel has the burden to establish the reasonableness of the fees. **West v. Sys. Applications Int'l**, 1994-CAA-15 (Sec'y Apr. 19, 1995).

In the present case, this Court must determine a reasonable and appropriate award for the three requested fees: Complainant's reimbursement request related to prior representation, the PEER fee petition, and Attorney Landry's fee petition.

Complainant's Original Counsels

Complainant requests a reimbursement award of $6,250.00, in compensation for the retainer fee she paid in connection with this matter to her two previous attorneys. Complainant has submitted an affidavit in support of this fee, stating that she has paid Attorney Fidelma Fitzpatrick a retainer of $2,250.00 and Attorney Patricia Andrews a retainer of $4,000.00. (CX 136)

Respondent argues that this request should be denied because it is untimely, the documentation submitted was not subject to cross-examination, and that the Complainant's own affidavit notes that some of her prior counsel's time was spent on matters solely related to Complainant's State Superior Court action. Further, Respondent objects to the unsworn affidavit of Attorney Andrews. (EX 128)

As previously noted, I have granted Complainant's Motion to Further Expand the record in this matter. Thus, I find it is reasonable to consider the evidence submitted in support of the fee related to Complainant's services with Attorneys Fitzpatrick and Andrews. I do, however, keep in mind Respondent's arguments and criticisms of specific evidence in determine the weight and

credibility given to such documents. I also find that the fee request, confirmed by Complainant's affidavit, of $6,250.00 appears to be a reasonable retainer amount under the circumstances. Nevertheless, I note that an agreement between a complainant and his or her attorney does not affect the amount a respondent is required to pay. **See Lederhaus v. Paschen & Midwest Inspection Services, Ltd.**, 1991-ERA-13 (Sec'y Jan. 13, 1993). Further, I agree with Respondent that this amount request is suspect, as Complainant's own affidavit acknowledges that part of the services performed by both Attorneys Fitzpatrick and Andrews were related to Complainant's State Superior Court action.[89] Thus, in light of the ambiguity in support of this claim, and the amount of time utilized to pursue this action versus the state claim, I hereby reject Complainant's request for reimbursement of $6,250.00. Rather, I find and conclude that a reimbursement of $3,125.00, one-half of Complainant's request, represents a more adequate and reasonable amount, based on the fact that some amount of the services performed were not in connection with this present action.

PEER Fee Petition

Public Employees For Environmental Responsibility (PEER), Todd Robins, Attorney for Complainant has requested a fee of $99,356.25, based upon 567.75 hours at $175.00 per hour, covering his representation of Complainant from May 4, 1998 to the present.[90] Respondent objects to PEER's fee, arguing that both the rate and hours requested are excessive.

Reasonable Hourly Rate

Attorney Robins requests compensation based on a rate of $175.00 per hour. In support of this rate, Attorney Robins has submitted the Laffey Matrix, which is often utilized by courts in Washington, D.C., to determine a reasonable rate. Attorney Robins is a 1997 law school graduate, and the Laffey Matrix places the average fee for attorneys with one to three years experience at $155.00. Attorney Robins requests a fee with an increase of twenty dollars, to $175.00 per hour based upon his experience in both employment discrimination and environmental law. Respondent challenges the rate as excessive.

I noted that an administrative law judge determines the hourly rate by weighing the arguments and affidavits submitted by the parties. **Smith v. Esicorp**, 1993-ERA-16 (ARB Aug. 27, 1998). Further, the Administrative Review Board has held that a complainant's attorney fee petition must

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[89] In this respect, I note that Attorney Landry submitted two pleadings to modify and amend his legal fee petition to remove hours spent pursuing Complainant's State Superior Court action. (CX 129; CX 135)

[90] The original request was submitted based on 553.5 hours (CX 127), however, Attorney Robins submitted an amended fee adding 14.25 hours for time spent on filing the reply brief in this matter. (CX 133) I noted that a fee for time spent on the attorney fee is appropriate and recoverable in whistleblower actions. **See Larry v. The Detroit Edison Co.**, 1986-ERA-32 (Sec'y May 19, 1992).

include adequate evidence of the reasonable hourly fee for the type work the attorney performed and consistent with the practice in the local geographic area of the hearing. **See Fabricius v. Town of Braintree/Part Dept.**, 1997-CAA-14 (ARB Feb. 9, 1999); **Van Der Meer v. Western Kentucky Univ.**, 1995-ERA-38 (ARB Apr. 20, 1998).

I reject Attorney Robins's request for a rate of $175.00 per hour. I find that rate excessive and unsupported. Attorney Robins submits the Laffey Matrix in support of his fee, however, that Matrix represents average rates for the Washington, D.C. areas. I note that despite the fact that PEER is based in Washington, D.C., this Court must determine the reasonable rate for the geographic community of where the hearing took place. Further, I note that the Laffey Matrix provides that the average fee for attorneys with one to three years experience, in the Washington, D.C. area, is $155.00 per hour. Attorney Robins requests a fee of an additional $20.00 based upon experience in employment discrimination and environmental law, however, he has failed to submit any documentation or affidavits which adequately and convincing explain his "experience," or justify a significant increase in the average rate for a 1997 graduate in the Washington, D.C. area.[91] Therefore, I conclude that Attorney Robins has not met his burden of establishing a reasonable rate in the community. Rather, I find that a rate of $150.00 is reasonable under these circumstances, based upon Attorney Robins known experience, his handling of this case, and, most significantly, the prevailing rates in Rhode Island and New England for similarly situated attorneys based upon this Judge's twenty years of experience presiding over these cases.

Reasonable Number of Hours

Attorney Robins submits a fee based on 567.75 hours of time in representing Complainant between May 4, 1998 and the present.

Respondent challenges the hours requested as excessive. Respondent argues that the hours were not sufficiently documented and that they were duplicative and vague. Specifically, Respondent alleges that the rates are "clearly excessive and amazingly rounded," and that the time spent at the trial was excessive. Rather, Respondent contends that this hearing should have been completed in four days. Further, Respondent requests the fee to be reduced, if Complainant is not successful on any of her claims.

Initially, I note, that following Respondent's objection, Attorney Robins has submitted a great deal of documentation and affidavits in support of the hours expended. Upon review of the documentation, I find that all the hours expended have been, for the most part, adequately described

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[91] While Attorney Robins states: "During the course of my career I have developed specific expertise and concentrated my practice in the areas environmental law and whistleblower discrimination law," (CX 134), he does not qualify if this experience involved activities prior to becoming an attorney, or the extent of the "experience" he refers to. Further, he has not submitted support for what the applicable rate for a 1997 graduate with extensive employment and environmental experience. Thus, without adequate support, his requested rate cannot be approved.

for purposes of a fee petition.[92] Nevertheless, I find and conclude that Respondent's argument based upon a percentage reduction in fee, due to inadequate description of rates, was valid when made, and therefore, shall be addressed below.

Respondent is correct to note that an administrative law judge may reject time a complainant's counsel spends discussing the case with press. **Fischer v. Town of Steilacoom**, 1983-WPC-2 (ALJ May 2, 1993). Attorney Robins, however, asserts that while PEER "invested substantial time and resources in engaging in public advocacy, media communications and legal action in connection with Complainant's whistleblowing since May, 1998, as a matter of organizational policy PEER does not record as billable hours any of this time. Absolutely all of the time accounted for in my Fee Petition reflects time spent on matters directly connected with the litigation of this case." (CX 134) Thus, I find Respondent's argument regarding time spent talking to the press is moot.

Next, I do accept Respondent's argument that a percentage reduction is warranted in Attorney Robins's fee. Generally, a respondent must make a specific objection to particular, itemized services which they find are excessive, duplicative, or inaccurate. Nevertheless, it is permissible for a respondent to make a general objection, requesting a percentage decrease in fee, where the fee, as itemized, is inadequately documented. In such situations, an administrative law judge has the authority and discretion to reduce the attorney fees by a percentage for work on "policy arguments and peripheral and irrelevant issues" or other strong reasons for a downward departure. **See Smith v. Esicorp**, 1993-ERA-16 (ARB Aug. 27, 1998).

I find that a downward percentage reduction of ten (10%) percent is appropriate in this case for several reasons. First, Attorney Robins admits that the nature of PEER's non-profit practice requires that he also perform some administrative tasks in representing Complainant. (CX 134) While I am sensitive to the numerous over-head, and funding challenges faced by PEER and other non-profit groups, I find that awarding $150.00 per hour on time spent performing routine, administrative tasks to be unfair to Respondent in this matter. Further, I find that some of the services performed in this hearing were duplicative. At the outset, however, I must voice my disagreement with Respondent's claim that this matter could have, and should have, been tried in four days. I do not see how that could be possible in light of the complexity of this case, especially given the existence of three complaints, the number of witnesses, the pre-hearing battle of motions and the counter-motions, and the like. Further, while it is appropriate to reduce a fee, if a Complainant spends a great deal of time on policy, rather than fact, I do not find that to be the case here. **Cf. Varnadore v. Oak Ridge Nat'l Laboratory**, 1992-CAA-2/5; 1993-CAA-1 (ALJ Sept. 22, 1994). This full record is nothing if not factually intensive. Both parties, and all counsel, have correctly and professionally focused this Court attention on the facts of the case, rather than policy arguments for or against recovery. Nevertheless, I find that some of the time spent on this matter was duplicative and inadequately described in regard to the questioning of witnesses, and pre-trial discussions

[92] For example, Attorney Robins clarified that the 11 hours spent on May 8, 1998 "drafting the complaint" also included time for reviewing materials from Complainant's prior attorneys. (CX 134)

between Attorney Robins and Attorney Landry. Further, I find that Attorney Robins spent an excessive amount of time on the pre-hearing discovery disputes. Therefore, I find that a ten (10%) reduction in hours expended by Attorney Robins, from 567.75 to 511, is fair and reasonable under the circumstances.[93]

Accordingly, I hereby approve an attorney fee of $76,650.00 for PEER, and Attorney Robins, based upon 511 hours of time billed at $150.00.

Landry Fee Petition

Attorney Joel D. Landry request a fee of $189,750.00, representing 759 hours at a rate of $250.00 per hours, for his representation of Complainant between October 26, 1998 and the present. (CX 128; CX 135)[94] Respondent objects arguing that the rate is excessive and the hours expended were duplicative, vague, and unnecessary.

Reasonable Hourly Rate

Attorney Landry requests that this Court approve a rate of $250.00 per hour based upon his extensive experience of thirty-three years of practice, including many years as an Assistant Attorney General in Rhode Island. In support of this rate, Attorney Landry submits the affidavit of Thomas Gidley, Esq., a Rhode Island attorney, which states that the rate is fair and reasonable for the services performed.

Respondent, on the other hand, argues that he rate is excessive, and submits an affidavit of Attorney Oliverio stating that a rate of $250.00 is much higher than the reasonable fee for services in fee shifting litigation in Rhode Island. Respondent also submits various pleadings from a prior state court claim, where Attorney Landry billed at $150.00 per hour.

I find and conclude that Attorney Landry has met his burden for substantiating a rate of $250.00 as appropriate for himself, and in the community. I note, that Respondent has also failed to submit credible evidence of an appropriate fee in this case. Respondent has submitted evidence of

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[93] I pause to reject the arguments of both parties based upon a change in rate due to success on the merits. I noted that Complainant, while not being awarded the $3.8 million requested, has succeeded on the merits of all three of her claims. Therefore, I reject Respondent's argument that a downward departure is necessary. Further, I reject Complainant's argument that success on the merits in this case, justifies an upward departure. I conclude, rather, that the award of attorney fees should be determined based on the lodestar method of a reasonable fee based on a reasonable hourly rate.

[94] This fee request represents Attorney Landry's reduction of 83 hours spent on Complainant's Superior Court action. (CX 135)

a prior case where Attorney Landry sought a fee of $150.00 per hour, however, I find that rate is too low based upon his representation in this case, and his thirty-three years of experience. Further, I note that Attorney Landry has explained his billing of $150.00 occurred during a 1992 case involving different circumstances.

Rather, I find and conclude that an appropriate rate in this case for Attorney Landry is $250.00 per hour. I base this fee on a number of factors: the complexity of this case, Attorney Landry's professional experience, Attorney Landry's excellent presentation of this case at hearing, and this Judge's extensive experience in the community of New England as an administrative law judge for the last twenty years. **See Pillow v. Bechtel Constr., Inc.**, 1987-ERA-35 (ARB Sept. 11, 1997).

Reasonable Number of Hours

Attorney Landry submits a fee petition based on 759 hours of time on this proceeding.[95] Respondent argues that those hours are duplicative, vague and excessive. Attorney Landry, however, states that his hours are adequately documented and are reasonable in light of the complexity of this case. Further, Attorney Landry states that the time expended at the hearing was not excessive in light of the number of issues involved and the fact that the testimony of several RIDEM employees led to further documentary evidence that had not been brought to light previously.

As discussed under Attorney Robins's fee, I find that this matter was well litigated by all parties. I find, however, that some of the time spent questioning witnesses, and preparing for this case was duplicative. Further, I find that the time expended by both Attorney Robins and Attorney Landry together, is not fully documented to allow for itemized reductions. Thus, I find this case presents an appropriate situation for a percentage reduction in the hours approved. **See Varnadore v. Oak Ridge Nat'l Laboratory**, 1992-CAA-2/5; 1993-CAA-1 (ALJ Sept. 22, 1994). I find that some of the hours spent questioning witnesses, and time spent discussing the case between co-counsel is duplicative, and to let the hours stand as requested would be unfair and unreasonable to Respondents. Therefore, I find and conclude that a five (5%) percent reduction in the hour for Attorney Landry, from 759 to 721.1, is appropriate.

Accordingly, I hereby approve of an attorney fee of $180,275.00 for Attorney Joel D. Landry, based upon 721.1 hours of time billed at $250.00 per hour.

Costs & Expenses

Attorney Todd Robins, and PEER, requests reimbursement for litigation costs and expenses totaling $18,099.83. (CX 127) This request represents costs involving transcripts, travel, copying, supplies, mailing and telephone bills. Respondent objected to these expenses based on the fact that

[95] Attorney Landry's initial request of 842 hours was reduced by 83 hours to eliminate time spent before the Superior Court on a concurrent claim brought by Complainant. (CX 135)

the fee petition did not include any supporting documentation. (EX 126) Attorney Robins, after receiving Respondent's objection, has submitted the documentation for these costs. (CX 134)

I noted that a successful complainant is entitled to reimbursement of the costs in bringing and prosecuting the complaint. I find that Complainant's supplemental filing adequately documents the costs and expenses incurred by Attorney Robins and PEER. (CX 134) Further, I find and conclude that the requested costs and expenses are fair and reasonable under the circumstances. Therefore, I grant and approve Complainant's request for $18,099.83.

VII. RECOMMENDED ORDER

Based upon the foregoing findings of fact, conclusions of law and upon the entire record, I **RECOMMEND** Complainant Beverly M. Migliore be awarded the following remedy:

1) Respondent, Rhode Island Department of Environmental Management, shall pay to Complainant an award of $150,000.00 in front pay, upon her resignation from RIDEM.

2) Respondent shall pay to Complainant an award of $15,000.00 in back pay. Further, I recommend that Complainant be awarded prejudgement interest on the award of back pay, as calculated under 26 U.S.C. § 6621.

3) Respondent shall pay Complainant compensatory damages in the amount of $400,000.00 representing mental anguish, adverse physical health consequence, and loss of professional reputation.

4) Respodent shall pay Complainant $3,125.00 in damages, based on her expenditure of money for two retainer agreements with prior counsel.

5) Respondent shall a pay an attorney fee award of $76,650.00 to Attorney Todd Robins, of PEER, based upon 511 hours of attorney time billed at $150.00 per hour.

6) Respondent shall a pay an attorney fee award of $180,275.00 to Attorney Joel Landry based on 721.1 hours of attorney time at $250.00 per hour.

7) Respondent shall a pay an award of $18,099.83 to PEER, and Attorney Robins, as reimbursement for in costs and expenses.

It is **FURTHER RECOMMENDED** that

8) Respondent maintain Complainant's current health and life insurance policies for a period of two (2) years following her resignation from RIDEM.

9) Respondent shall immediately expunge Complainant's personnel file of record of the one-day suspension, written reprimand, and any other negative references relative to her protected activity.

10) Respondents shall post a written notice in a centrally located area frequented by most, if not all, of Respondent's employees for a period of sixty (60) days, advising its employees that the disciplinary action taken against Complainant has been expunged from her personnel record and that Complainant's complaints have been decided in her favor.

11) Respondent shall also forward a copy of the Final Order of the Administrative Review Board and/or Secretary of Labor to the EPA, Region One office in Boston, and further shall make a copy of said order available upon request by other RIDEM employees or other individuals.

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DAVID W. DI NARDI
Administrative Law Judge

Boston, Massachusetts

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, U.S. Department of Labor, Frances Perkins Building, Room S-4309, 200 Constitution Avenue, N.W., Washington D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. **See** 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).